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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. A-542

JAMES W. McCORD, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, James W. McCord, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on December 12, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The judgment of the United States District Court for the District

of Columbia, Criminal Case No. 1827-72 was entered on November 9, 1973. No opinion was rendered by the District Court for the District of Columbia.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on December 12, 1974 affirming the judgment of the United States District Court for the District of Columbia. An Order from this Court granting an extension of time to file Petition for Writ of Certiorari to and including February 10, 1975 was granted on December 30, 1974 and this Petition was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Did the actions, outlined below, of the United States Government, the prosecution, the White House officials, including Counsel to the President, the Attorney General, a high Treasury Department official, and others, individually and in conspiracy, together, and with Petitioner's trial counsel, violate Petitioner's Constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and his federal statutory rights? These actions were:

   a. Officials of the United States Government deliberately withheld and deliberately destroyed exculpatory evidence prior to and during Petitioner's trial, and prior to sentencing.

   b. Officials of the United States Government conspired with Petitioner's attorney for the pur-

pose of impeding, hindering, obstructing and defeating Petitioner's right to a fair trial.

c. Prosecutors conspired with Petitioner's counsel to introduce illegally obtained evidence at Petitioner's trial after prior agreement not to use such evidence.

d. Prosecutors knowingly presented evidence to the jury that included perjured testimony.

e. The United States Government chose to prosecute an individual that they knew was recruited by other officials or agents of the United States Government, including Counsel to the President and the then Attorney General, while at the same time, maintaining a policy of never prosecuting government agents who admittedly commit the same acts.

f. The prosecutors engaged in a course of conduct before, during and after the trial of Petitioner designed to conceal material evidence and deny Petitioner a fair trial.

II. Is the Assistance of Counsel Clause of the Sixth Amendment to the United States Constitution violated when Petitioner's counsel is disloyal to his client, conspires in an attempt with high government officials and others to persuade and force Petitioner to plead guilty and accept offers of clemency, cooperates with and advises those who masterminded the original Watergate operation of his client's trial plans and fails to convey to the Petitioner offers of the prosecution to dismiss charges in return for a guilty plea; and fails to object to the introduction of evidence illegally and improperly obtained by the prosecution?

III. Was the action of the Court of Appeals for the District of Columbia Circuit in failing to reverse the trial court so repugnant to civilized notions of criminal justice and to the fundamental fairness doctrine that it should not be permitted to stand?

IV. Was the Petitioner's conviction the product of an entrapment by the highest officials of the government?

V. Was the Presidential pardon of former President Nixon an invidious discrimination against Petitioner contrary to the Equal Protection Provisions of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth, Fifth, Sixth and Fourteenth Amendments

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE PROVISIONS INVOLVED

Title 18 U.S.C. Section 1503—*Influencing Witnesses.*

"Whoever corruptly . . . endeavors to influence, intimidate, or impede any witness, in any court of the United States, or . . . (whoever) corruptly . . . endeavors to influence, obstruct, or impede the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18 U.S.C. Section 241—*Conspiracy.*

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . they shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Title 18 U.S.C. Section 371—*Conspiracy.*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to affect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18 U.S.C. Section 201(d)—*Bribery.*

"Whoever, directly or indirectly, corruptly gives, offers, or promises anything of value to any person . . . with intent to influence the testimony under oath . . . as a witness upon a trial, hearing, or other proceeding, before any court, . . . of either House or both Houses of Congress . . . or with intent to influence such person to absent himself therefrom. . ."

Section 201(e)

. . . shall be fined not more than $20,000 or imprisoned for not more than fifteen years, or both . . .

Title 18 U.S.C. Section 1623—*False declarations before grand jury or court.*

"(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material

declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18 U.S.C. Section 1001—*Statements or entries generally.*

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18 U.S.C., Section 613—*Contributions by agents of Foreign Principals.*

"Whoever, being an agent of a foreign principal, directly or through any other person, either for or on behalf of such foreign principal or otherwise in his capacity as agent of such foreign principal, knowingly makes any contribution of money or other thing of value, or promises expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office; or

Whoever knowingly solicits, accepts, or receives any such contribution from any such agent of a foreign principal or from such foreign principal—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner, James W. McCord, Jr., was an employee of the Central Intelligence Agency for some 19 years during the period 1951 to 1970. He also served with the Federal Bureau of Investigation for four and one-half years during the period 1942 to 1943 and 1948 to 1951. He was skilled and experienced in the professional security and intelligence field. In September 1971, he was recruited by John J. Caulfield, a White House staff official, and informed that the Committee to Re-elect the President was faced with the problem of discovering and foretelling planned acts of violence directed against the campaign of the President for re-election and that efforts to ascertain and foretell such planned illegal acts of violence and disruption had the approval of the White House itself, including Counsel to the President, John Dean. Petitioner was hired as Chief of Security for the Committee on October 1, 1971.

He was advised in January 1972 by G. Gordon Liddy, general counsel of the Committee to Re-elect the President, that from electronic surveillance, the Committee hoped to ascertain and forestall any planned disruptive acts against the President's candidacy for re-election. Liddy and E. Howard Hunt, assigned to the White House, advised Petitioner of White House reports that the Cuban government of Dictator Fidel Castro was furnishing campaign contributions to persons in the headquarters of the Democratic National Committee in an effort to intervene in the United States national elections, and, in the event the Democratic candidate was elected, to obtain recognition of the existing Cuban government. Such acts would have been in violation of Title 18, U.S.C., Section 613.

In February, 1972, Petitioner was asked to submit a budget for the equipment required to enter and conduct electronic surveillance of the Democratic National Committee Headquarters located in the Watergate Complex in Washington, D.C. He was told specifically at that time by Liddy that the operation had been expressly approved by John Mitchell, the Attorney General, and John Dean, Counsel to the President.

The entry into the Democratic National Committee Headquarters was accomplished on Memorial Day weekend, 1972, through a rear entrance door, previously taped so it would not lock. Electronic listening devices were installed on two telephones by the Petitioner. Photographs were taken of certain files by the other participants in the entry. Petitioner later was advised that the Attorney General of the United States and the White House received the information from the electronic listening devices. Petitioner was told that a second entry would be required. This entry was made on June 17, 1972, and Petitioner and four others were apprehended at the scene and taken to the jail in the District of Columbia. Indictments were not returned until September 15, 1972, eighty-nine days after the arrest of Petitioner and the four other participants.

Petitioned pled not guilty; did not testify at the trial and was found guilty on January 30, 1973 of three counts of illegal interception of oral and wire communications, two counts of possession of intercepting devices, two counts of burglary and one count of conspiracy to commit the foregoing offenses. Judgment was entered on November 9, 1973 by Chief Judge John J. Sirica. Petitioner was sentenced to serve a total sentence of not less than one (1) year and not more than five (5) years.

Since the trial in the United States District Court and since the time that briefs were submitted to and arguments made thereon to the United States Court of Appeals, literally a flood tide of information has been revealed that directly relates to the issues raised herein. Now public knowledge are the Presidential tapes, the testimony of John Dean and Jeb Magruder and the evidence adduced at the trials of John Mitchell, John Ehrlichman, Robert Haldeman, Kenneth Parkinson and Robert Mardian.

Petitioner filed a motion with the trial court prior to imposition of sentence on November 9, 1973, requesting an evidentiary hearing regarding lack of effective representation by counsel, perjury by government witnesses Magruder and Porter and concealment of evidence by the United States Government, including the White House and others. Petitioner had fifteen witnesses scheduled to testify at the requested hearing. The trial judge denied the motion.

REASONS FOR GRANTING THE WRIT

I. PETITIONER BELIEVES THAT THE COURT SHOULD GRANT THIS PETITION BECAUSE THIS CASE PRESENTS UNIQUE QUESTIONS FOR RESOLUTION REGARDING THE CONSTITUTIONAL EFFECT OF WHAT IS ALLEGED TO BE A PERVASIVE CONSPIRACY ON THE PART OF OFFICIALS OF THE UNITED STATES GOVERNMENT, INCLUDING THE PROSECUTION, TO DENY A DEFENDANT DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW. IN THE CASE PRESENTED, THERE IS A VEHICLE BY WHICH THIS COURT CAN ESTABLISH THE DUTIES WHICH ARE IMPOSED ON FEDERAL OFFICIALS, THE PROSECUTION AND DEFENSE COUNSEL IN THE TRIAL OF EVERY CRIMINAL CASE.

Petitioner's conduct at all times since he was first recruited has been consistent with his professed belief that he was engaged in an intelligence gathering opera-

tion authorized by the highest levels of government, including the Attorney General, to ascertain planned illegal conduct.

Shortly after his arrest, Petitioner began to entertain a concern that the top administration officials employing him might not come forward and reveal that they had authorized the operation. Attempts were made to coerce Petitioner to plead guilty, remain silent, accept money and legal fees and rely on executive clemency and "rehabilitation." From the first, Petitioner vigorously rejected these attempts to the consternation and alarm of those officials who had engaged the Petitioner as Security Chief. Gradually, over a period of several months, Petitioner began to realize that those high government officials were planning to and did commit perjury, subornation of perjury, bribery and otherwise engage in a conspiracy to protect their own positions in government and to insure that the investigation ended with the trial and conviction of the original seven defendants. Petitioner, at those times, possessed information as to the involvement and perjury of some government officials, but much of his information could not be proved, was in the category of hearsay and would have been characterized as unsupported allegations during the time of his trial. A week after his trial began, Petitioner's attorneys still had not informed their client of the defense to be asserted. Petitioner was becoming increasingly concerned that his attorneys were active members of the conspiracy embracing the prosecution and other government officials to insure his conviction and to limit further investigation and prosecution. It seemed to Petitioner that his fellow defendants had been silenced

by such efforts. Their actions gave substance to what had been earlier only the shadow of suspicion.

Petitioner, who had never been arrested prior to that time, was not a lawyer. He had, at that point, deep distrust of top White House aides, the then Attorney General, the F.B.I. Director, the prosecution and his own attorneys. The perjury, the recanting of testimony previously given under oath by high officials, actions of highly-placed officials in destroying evidence, and failure to investigate have been slowly revealed in detail since the trial of Petitioner, justifying his earlier distrust.

Those who controlled the operation vacillated. In contrast, the actions of the Petitioner always have been consistent with his professed belief that he was lawfully engaged in an authorized intelligence gathering operation to learn of planned future illegal activities.

The actions of key government officials in engaging in bribery, perjury, destruction of evidence and the like to protect their own positions at any costs, now are fully documented. Likewise, the Petitioner's testimony to the Senate Select Committee, the first available forum in which he had trust and confidence, was the first evidence received by the American people and the Congress of the true story of the Watergate operation and clearly revealed the involvement of the White House, the former Attorney General, the Counsel to the President, and other high government officials.

The actions of the Petitioner always have been consistent with his refusal to play any role in government misconduct; Petitioner did not plead guilty, did not

accept clemency, did not promise to remain silent, nor did he remain silent and he advised two government agencies before and during trial of the identities of high government officials engaged in the Watergate operation and its cover-up. When Petitioner's conduct is contrasted with the proven illegal actions taken by those high government officials who subsequently have been convicted, it is difficult to understand the basis for Chief Judge Bazelon's opinion, Appendix I, page 26a herein, when he states "McCord . . . was not prejudiced in any way in this case by the actions of the government . . . McCord was not merely the object of the governmental misconduct, but was a participant in it."

(a) Officials of the United States Government Deliberately Withheld and Deliberately Destroyed Exculpatory Evidence Prior To and During Petitioner's Trial and Prior To Sentencing.

There was a deliberate effort by the highest Executive Branch officials of the government of the United States to forestall and impede any investigation that would result in the involvement of those high officials who had approved and at whose request the intelligence gathering activities of the seven indicted individuals had been initiated.

These efforts by the highest officials of the Executive Branch of the United States Government are fully outlined in the Presidential tapes, the recent testimony of John Dean, Jeb Magruder and others, as well as in the American Civil Liberties Union's brief filed in this case in the Court below.

The highest official in the land, President Nixon, concealed evidence and conspired with others in a

course of conduct designed to limit the prosecution to the original Watergate seven. In the June 23, 1972 Presidential tape, when told that John Mitchell was involved in the Watergate operation, Mr. Nixon stated, "We won't second-guess Mitchell and the rest. Thank God it wasn't Colson . . . (we'll) play it tough . . .". The President resigned immediately after the contents of this tape were disclosed to the public.

On September 15, 1972, the day the indictments were handed down in the original Watergate case, Mr. Nixon complimented John Dean on "keeping his finger in the dike" thus keeping the indictments from spreading to those higher up. From the Presidential tape of January 8, 1973, we learn that Mr. Nixon, in conversation with Charles Colson, agreed to executive clemency for E. Howard Hunt, Colson's former employee at the White House. On March 22, 1973, Mr. Nixon told John Mitchell, ". . . *up to now the whole theory has been containment, as you know, John.*" (See House Judiciary Committee Report of Presidential Transcripts, page 183, Serial No. 34, May-June, 1974.)

H. R. Haldeman has admitted, under oath, that he learned in February, 1972, of the substance of the meetings in John Mitchell's offices at the Department of Justice in January and February 1972 in which the Watergate operation was being planned (Senate Select Committee Hearings, Book 8, page 3035). This information was concealed from the Grand Jury, the F.B.I. and the jury at Petitioner's trial.

H. R. Haldeman recently was convicted of unlawfully attempting, in June, 1972, to get the C.I.A. to

intervene in and curtail the F.B.I.'s investigation into Watergate.

John Ehrlichman has admitted, under oath, that he learned in June, 1972, from John Dean of the planning meeting for the Watergate operation held at Attorney General John Mitchell's office, attended by John Dean, John Mitchell, Jeb Magruder and Gordon Liddy (Senate Select Committee Transcript, pages 5363-5366). Ehrlichman recently was convicted of unlawfully seeking, in June, 1972, to have John Dean dispose of some of the electronic equipment stored in the White House, after it had been used in the Watergate operation. Also, F.B.I. Director Gray was burning White House files of E. Howard Hunt two weeks before Petitioner's trial. None of the above was ever disclosed to the Grand Jury which indicted Petitioner or to the trial jury which convicted him.

John Dean was the moving force in the cover-up. Magruder testified before the Senate Select Committee (SSC Transcript page 2011) that on August 16, 1972 just before he was to testify before the Federal Grand Jury, Dean, in suborning perjury on Magruder's Grand Jury performance, said that "even if the worst happened, everything would be taken care of, including executive clemency."

John Dean told President Nixon that he was receiving Grand Jury information from Acting Attorney General on Watergate matters, Henry Petersen. John Dean told President Nixon, "(t)here is no doubt that I was totally aware of what the Grand Jury was doing. I knew what witnesses were going to be called. I knew what they were asked, and I had to . . . Petersen . . . kept me informed. He told me when we had problems,

where we had problems and the like." (Presidential Transcripts, page 185, March 21, 1973). Petersen has confirmed the substance of this testimony of Dean in that he admitted briefing Dean some two or three times per week (Senate Select Committee Staff Interview of Petersen, June 4, 1973, page 1).

In December, 1972, John Dean told Henry Petersen that he had secretly given certain items to F.B.I. Director Gray that came from the White House safe of E. Howard Hunt. Henry Petersen did not request that Dean be called as a witness at Petitioner's trial. He waited until the Watergate case broke in March, 1973, to even question Gray about this matter (Senate Select Committee Hearing, pages 7485-7486).

John Dean has testified that from July to October 1972 he was receiving raw F.B.I. reports and up to 80 F.B.I. teletypes from F.B.I. Director Gray on the Watergate investigation; that during trial he destroyed E. Howard Hunt's address book and list finder which had been stored in Hunt's White House safe and which Hunt had testified would have been a "guidebook for an F.B.I. investigator to unravel the Watergate hierarchy" and that he, Dean, sent John Caulfield, a Federal Treasury Department law enforcement official, to try to persuade McCord to remain silent by offering Petitioner executive clemency and payments while in prison. (Senate Select Committee Transcripts, pages 2199-2200; Senate Select Committee Staff Interviews of John Dean and John Caulfield, May 17, 1973 and June 16, 1973).

Henry Petersen was the Acting Attorney General for Watergate matters and head of the Justice Department's Criminal Division. His principal assistant in

Watergate matters was the chief prosecutor, Earl Silbert. John Dean has testified that Petersen passed on to him the results of Magruder's Grand Jury appearances. John Dean's access to information from Petersen enabled John Dean and his White House associates to perpetuate the cover-up. President Nixon put Petersen in charge of the Watergate investigation in April, 1973 and boasted to Haldeman and Ehrlichman, "I've got Petersen on a short leash."

Richard Kleindienst, Attorney General, Petersen's immediate supervisor, has testified that on June 17, 1972, G. Gordon Liddy approached him on the Burning Tree Golf Course in Washington, D. C. and said "Mitchell has sent us out here to talk to you and he wants those five people who were arrested last night released from jail . . . some of the people arrested might have some connection with the White House or the Committee to Reelect." Kleindienst never told anyone of this conversation until after Petitioner's trial. (Senate Select Committee, Book 9, page 3562). His failure to report this conversation to his subordinates—the Watergate prosecution and to the F.B.I.—constitutes, in lesser mortals, a felony—misprision of a felony. Kleindienst never has been indicted or tried for this crime.

John Ehrlichman has testified that on or about July 31, 1972 he and John Dean met with Richard Kleindienst "to discuss the Magruder involvement in the Watergate case" (Senate Select Committee Transcripts, page 5285). Ehrlichman testified that he, in turn, discussed Magruder's involvement with President Nixon.

Then Acting Director of the F.B.I., L. Patrick Gray, admitted under oath, that in December 1972, he de-

stroyed documents relevant to this case (Tr. 7075, Senate Select Committee Hearings). Other exculpatory information was contained in Robert Mardian's testimony before the Senate Select Committee (Committee Transcript 4790, 4876, 4879, 4932-36). Mardian testified that he had been told by Liddy that the "Watergate operation was a continuation of the 'plumber's' operation and he (Liddy) implied that President Nixon expressly approved the Watergate operation." Had the Mardian testimony been produced at trial, this would have supported an additional McCord defense that he was a government or quasi-government employee. (See also pages 19-29 Brief of American Civil Liberties Union, which was a part of the record on appeal).

Seventeen of the Presidential tapes were entered into evidence in the recent 1974 Watergate cover-up trials. These tapes clearly indicate concealment of evidence from Petitioner's trial by the highest officials of government, including the President. Three of these tapes were obtained by the Special Prosecutor's office prior to the February 1974 filing of the Special Prosecutor's opposition to Petitioner's appeal before the United States Court of Appeals. All of the other tapes were obtained prior to September 1974 and thus, prior to the December 12, 1974 date when the United States Court of Appeals affirmed the Petitioner's conviction. However, all these tapes have been denied to Petitioner, although requested by him.

President Nixon admitted on March 6 and 16, 1974, that on March 21, 1973, he received information from John Dean to the effect that the testimony of the original defendants was corruptly influenced and that bribery was used to influence and control the original

defendants' testimony. This information, possessed by John Dean, never was made available to the Petitioner, the trial judge or the jury in Petitioner's trial.

How can this be reconciled with *Brady* v. *Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)? Here it has been clearly shown that President Nixon, Attorney General Kleindienst and the entire prosecution denied Petitioner this exculpatory evidence bearing on guilt or innocence of Petitioner. The duty of disclosure affects not only the prosecutor but the government as a whole. *United States* v. *Bryant,* 142 U.S. App. D.C. 132, 439 F.2d 642 (1971).

The text of the indictment returned March 1, 1974 by the Watergate Grand Jury of the United States District Court for the District of Columbia impaneled on June 5, 1972 to determine whether there had been violations of 18 U.S.C. 371, 2511 and 22 D.C. Code 180(b) and other statutes of the United States and of the District of Columbia, is of interest. The indictment returned against John Mitchell, Harry R. Haldeman, Robert C. Mardian, John Ehrlichman, Charles W. Colson, Kenneth W. Parkinson and Gordon Strachan charged conspiracy to influence, obstruct, and impede the investigation *in connection with the trial of Criminal Case No. 1827-72 (Petitioner's trial), for the purpose of concealing and causing to be concealed, the identities of the persons who were responsible for, participated in, and had knowledge of (a) the activities which were the subject of the investigation and trial and (b) other illegal and improper activities.* Paragraph 17 of the indictment lists the means by which the conspirators did carry out the conspiracy *and includes their offer of executive clemency and other benefits to Petitioner;* their obtaining informa-

tion from the Department of Justice and their removal, obstruction, concealment and altering of documents, papers, records and objects. Also under overt acts, paragraphs 19 and 33, directly deal with Petitioner.

The trial and its results are well-known now. How can the government now assert that these actions, illegal by the government's own words in the indictment targeted at Petitioner's trial, did not deprive the Petitioner of due process and equal justice under the law?

(b) Officials of the United States Government Conspired With Each Other and With Petitioner's Attorney in Violation of Title 18, U.S.C., Sections 201(d), 241, 371 and 1503.

These issues have been discussed in some detail in Section I, (a), *supra,* and in Section II below.

The record below and recent public disclosure make clear the attempts by government officials to persuade Petitioner to plead guilty, accept executive clemency, receive payment of funds for attorneys fees, payments while in prison, and offers of a job when he was released from prison. Petitioner was contacted by agents of the White House who offered him executive clemency in return for his silence (pages 133-141, Book I, Hearings before the Senate Select Committee on Presidential Campaign Activities). Also, see Caulfield and Ulasewicz testimony before the Committee, pages 265-285 and 286-290, respectively. See statements made by John Dean in this Senate testimony (pages 974-975, Book III).

Gerald Alch, Petitioner's trial counsel, partner of F. Lee Bailey, made repeated efforts in a conspiracy with William O. Bittman, Hunt's attorney, Paul O'Brien, John Mitchell's CRP attorney, and others, to silence the Petitioner, have him plead guilty, and take

executive clemency, as a bribe, along with payments for legal fees and payments while in prison.

Petitioner's counsel, without objection, permitted the prosecution to wrongfully introduce electronic equipment into evidence at trial, although Petitioner's trial counsel clearly knew that such equipment had been obtained by pressure and deceit in violation of a written agreement.

It has been fully documented that the law firm representing Petitioner was in close contact with and sought favors from John Mitchell, and kept Nixon administration officials informed of actions and reactions of Petitioner before trial and during trial.

Petitioner contends that the massive attempts to obstruct justice in this case amounted to a denial of that fundamental fairness which is generally called "due process." That term expresses in its ultimate analysis, respect enforced by law for that feeling of just treatment which has evolved through centuries of Anglo-American constitutional history and civilization and cannot be imprisoned within limits of any formula. *Unglesby* v. *Zimmy,* 250 F. Supp. 714 (N.D. Cal., 1965).

(c) The Prosecutors Conspired With Petitioner's Counsel To Obtain and Did Introduce Evidence Illegally Obtained at Petitioner's Trial After Prior Agreement Not To Use Such Evidence.

This issue is discussed in detail in Section II of this Petition under Lack of Effective Assistance of Counsel.

(d) The Prosecutors Knowingly Presented Evidence to the Jury That Included Perjured Testimony.

Magruder and Porter committed perjury at Petitioner's trial. Magruder testified (Tr. 1422), that he

knew of no persons higher up than Liddy who were involved in the Watergate break-in. Porter supported that testimony (Tr. 1425-31). Both Magruder and Porter, since Petitioner's trial, have admitted committing perjury at the trial (pages 637, 805, Book II, Hearings Before the Senate Select Committee on Presidential Campaign Activities). Had these witnesses told the truth at Petitioner's trial, they would have implicated John Dean, Counsel to the President, and John Mitchell, former Attorney General, as well as other high government officials, for their roles authorizing the Watergate operation and its subsequent cover-up. Their testimony would have enabled Petitioner to effectively assert the defense that his acts were directed and approved by the Counsel to the President and the then Attorney General. Their truthful testimony would have indicated that the Counsel to the President of the United States and other high government officials directed and approved attempts to coerce Petitioner to plead guilty, refuse to testify, accept bribes and rely on executive clemency. The false testimony that contributed to Petitioner's conviction has thus far been permitted to stand uncorrected in this trial record. Thus, the conviction rests upon a false foundation and is impermissibly tainted in terms of due process and equal protection under the law.

The government has claimed that there is no likelihood that government witnesses' failure to tell the truth harmed the Petitioner or that the truth would have aided him. This is patently absurd. Also the burden is on the prosecution to show that the perjury of their own witnesses was harmless and that it did not,

in fact, contribute to the conviction of the Petitioner, and the prosecution has not done so. *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Any perjury which contributes to the conviction of a defendant denies the defendant his rights under the Fifth Amendment. The government cannot deny an accused a fair trial and then argue on appeal that he was guilty anyway; the accused is simply entitled to a fair trial. The perjured testimony of Magruder and Porter was referred to in both the opening and closing statements by the prosecutor. (See Tr. 2323, 2039, 2063.) The trial judge told the jury on several occasions that the prosecution vouched for the credibility of its witnesses.

The testimony of Magruder and Porter assisted the prosecutors in picturing Petitioner to the jury as being engaged in a private cloak and dagger operation under the direction of Liddy, who, like Petitioner, pled not guilty and did not testify. This was the keystone of the prosecution's case and the jury believed it. The prosecution has not proved that the perjured testimony was harmless. Where the error is not proved to be harmless, a new trial is demanded. *Chapman* v. *California, supra.*

There is credible evidence that the prosecution also knew, or had reason to know, that it was sponsoring perjured testimony by Magruder. Government witness Hugh Sloan has testified, under oath, that he informed the prosecution of Magruder's probable perjury at the trial. This was brought to the attention of the prosecution *before* the trial (deposition of Hugh Sloan, Jr. in Civil Action No. 1233-72, U.S. District Court for the District of Columbia, May 7, 1973, pages 138-40). Sloan

told the prosecution that Magruder had asked him to commit perjury. The prosecution never questioned Magruder or Sloan during the trial on the accusation of subornation of perjury. The government has an obligation to correct false evidence given by its own witnesses, for whose credibility it vouches and it has not done so. *Napue* v. *Illinois*, 360 U.S. 264, 3 L.Ed. 2d 1217, 79 S.Ct. 1173 (1945); *Alcorta* v *Texas*, 355 U.S. 28, 2 L.Ed. 2d 9, 78 S.Ct. 103 (1957).

(e) The United States Government Chose To Prosecute an Individual That They Knew Was Recruited by a Person, Liddy, Acting Under the Auspices of the Counsel to the President and the Then Attorney General, While at the Same Time, Maintaining a Policy of Never Prosecuting Government Agents Who Admittedly Commit the Same Acts.

Petitioner was indicted, tried and convicted for *inter alia*, violation of the United States Statutes regarding wiretapping and electronic surveillance (18 U.S.C., Chap. 119).

In the instant case, Petitioner, while not a government employee at the time of the offense herein, believed he was acting with the explicit approval of the Attorney General of the United States and the Counsel to the President, and therefore as an agent of the government. Subsequent events and material, including Presidential tapes not available at the time of trial in the United States District Court, or at the time of appeal briefs and arguments, have confirmed Petitioner's belief that he was acting as an agent of the government. Petitioner so testified in a deposition in Civil Action No. 1233-72 in the United States District Court for the District of Columbia and before the Senate Watergate Committee.

In *United States* v. *United States District Court for the District of Michigan*, 407 U.S. 297, 92 S.Ct. 2125, 33

L.Ed2d 752 (1972), decided on June 19, 1972, only two days after the Petitioner's arrest, the Supreme Court banned the so-called "domestic security wiretaps" which previously had been authorized by the President through the Attorney General without resort to appropriate warrant procedure. Statistics cited in Justice Douglas' concurring opinion, page 776, indicate that warrantless wiretaps authorized by the Executive Department were commonplace. Prior to this decision, the agents emplacing these devices in "domestic security cases" were acting under color of law in that their superior, the Attorney General of the United States, acting under authority of the President, had expressly approved the surveillances. No agent has been indicted or convicted for wiretapping or bugging in any of these instances where he acted under the authority of the Attorney General. The instant case is the only case known to the Petitioner where an individual has been convicted for electronic eavesdropping pursuant to authorization by the highest law enforcement officials of this nation. It is submitted that, at Petitioner's trial, in the United States District Court in January, 1973, the government was under duty to disclose evidence for the jury to consider that the Watergate bugging and eavesdropping had been authorized by Counsel to the President and the Attorney General, as the Presidential tapes and the testimony of John Dean clearly show. Yet, at the trial of the Petitioner, the government prosecutors' trial tactics were directed to the proposition that Liddy and the Petitioner were on a private enterprise of their own, purely for money.

It was common knowledge, at the time of the Watergate incident, that the Attorney General had the power, without a court warrant, to authorize on his own au-

thority, wiretapping operations. Petitioner was clearly aware of this authority and was influenced by this knowledge.

Petitioner concedes that this defense was not timely raised prior to his trial. He requests this Court to grant him relief because of the conduct of his former counsel prior to and during the trial. (See Part II, infra.) Since the government prosecutors were contending, and convinced the jury, that the acts were the private enterprise of Liddy and Petitioner for the purposes of blackmail and personal financial gain, it is not difficult to imagine the disposition of such a claim had Petitioner raised it as a defense at his trial when he was represented by counsel who sought to maintain Petitioner's silence and conceal the role of John Mitchell and others in the operation. (Paragraph 3 of Appendix 8 page 51a.)

(f) The Prosecutors Engaged in a Course of Conduct Before, During and After the Trial of Petitioner Designed To Conceal Evidence and Deny Petitioner a Fair Trial.

This issue is discussed in detail throughout the Petition and includes the conduct of the prosecution in using the witnesses Magruder and Sloan without advising the Court of Sloan's Grand Jury testimony that Magruder had suborned his perjury. Apparently even Attorney General Kleindienst, Dean and Ehrlichman had knowledge of this subornation of perjury. (Senate Select Committee Transcript, 5981-82; 5662; 5669-72; 5285; 7334).

In *Brady* v. *Maryland, supra,* the Court quoted from the case of *Pyle* v. *Kansas*, 317 U.S. 213, 215-16 relative to use of perjured testimony by the State, saying "These allegations sufficiently charge a deprivation of

rights guaranteed by the Federal Constitution and, if proven, would entitle Petitioner to release from his present custody."

Such conduct on the part of the prosecution is further typified by an incident occurring while Petitioner was testifying before the Grand Jury in April of 1973. Prosecutors Silbert and Glanzer completed their questioning of Petitioner and took him out of the Grand Jury room. Minutes later he was called back into the Grand Jury room and the foreman asked him if he had a copy of the memorandum of July 1972, which he, Petitioner, had stated earlier had been written to his attorney, Alch, warning that the Committee to Re-elect the President had a secret channel to the federal prosecutors and knew in advance of the prosecutors' trial tactics planned for Petitioner's trial. (Appendix 6.) page 48a. Petitioner said he had it and reached into his coat pocket to take it out and give it to the Grand Jury foreman. Before he could do this, Prosecutor Glanzer hurriedly stood up and took Petitioner out of the Grand Jury room stating, "We'll take that up at a later date." Petitioner was never again recalled to the Grand Jury.

Peter Wolf, Esquire, a respected Washington attorney, filed a Motion for a protective order on April 19, 1972 (Appendix 5 p. 43a) (shortly after Petitioner's letter to Judge Sirica) stating that during the late summer of 1972, he had contacted prosecutor Earl Silbert and had advised Silbert that one of his clients, less than 24 hours after Petitioner's arrest, had been ordered to the White House and secretly been given eight cartons containing files and materials belonging to E. Howard Hunt, one of Petitioner's co-defendants. At that time, Silbert was aware that Hunt had stored material evidence from the White House operation at the White

House. Wolf further asserted that neither Silbert nor the F.B.I. inquired of him concerning the eight cartons which Wolf was offering to deliver to Silbert. One of the cartons reportedly contained the "bugging plan" for the Watergate operation. It is beyond human comprehension how Silbert could refuse to even inquire into the existence of the said cartons unless Silbert himself was a part of the cover-up. If Wolf's allegations are true, then Petitioner's prosecutor, Earl Silbert, would be guilty of malfeasance, non-feasance, concealment of evidence, obstruction of court proceeding, all of which denied Petitioner his constitutional rights.

Although Petitioner had faith and trust in the integrity of the trial judge, as evidenced by the fact that it was to this judge that he chose to direct his letter of March, 1973, that broke the Watergate case, this trust did not extend to others involved. During the trial, he viewed the prosecution, the Attorney General's office, the F.B.I., the Executive Branch officials of the government, the White House Counsel and his own attorney as all being participants in the plot to limit the prosecution to those on trial and to conceal the role of others. Viewed in retrospect, there appears to have been sound reason for such a feeling on the part of the Petitioner.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL AS TO WHAT THE TERM "ASSISTANCE OF COUNSEL", AS STATED IN THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, REQUIRES.

Defense counsel, when fully briefed on the facts prior to trial, has the duty to vigorously assert all ethical defenses available to his client. Yet, Petitioner's counsel failed to meet this responsibility. That failure was so gross in this and other regards as to deny Petitioner his

right to counsel—*effective* counsel—under the Sixth Amendment.

Beginning on July 1, 1972, Petitioner repeatedly had advised Alch of the full scope of the roles played by John Mitchell, John Dean and Jeb Magruder in formulating and later attempting to cover-up the Watergate operation.

In fact, Petitioner's counsel, Gerald Alch, was warned by Petitioner during the first day of trial and again just prior to Magruder's testifying that Magruder, shown to be on the list of prosecution witnesses, would have to give false testimony to conceal his own, John Dean's and John Mitchell's roles in the Watergate operation.

Petitioner urged Alch to ask Magruder specifically on cross-examination two vital questions:

"Did you have knowledge of the Watergate operation before June 17, 1972?" and "Who else was involved?"

Despite Petitioner's urging, Alch, without explanation, did not ask either question.

Prosecutor Silbert has stated that substantial Jencks Act material was turned over to defense counsel prior to the testimony of Magruder and Sloan (Trial Transcript, p. 1723). This Jencks Act material included portions of the testimony of Sloan and Magruder given before the grand jury. This included Sloan's testimony that Magruder had urged him to lie to the grand jury about Watergate matters. This impeachment material, vital to the testing of the credibility of a material government witness, should have been the basis for a searching cross-examination of both Magruder and

Sloan on the question of subornation of perjury. Despite this, and despite a specific request by Petitioner to his counsel to probe for the truth in cross-examination, Petitioner's counsel did not ask a single question of Sloan about this subornation on cross-examination, nor did the prosecutor. Also, Petitioner's counsel avoided the issue completely in his perfunctory cross-examination of Magruder. This, Petitioner submits, goes far beyond the question of trial tactics or strategy and suggests, instead of loyalty flowing from a lawyer to his client, that Petitioner was denied effective assistance of counsel by this conspiracy of silence.

This is difficult to reconcile with the opinion of Chief Judge Bazelon who, on pages 12 and 13 of his opinion below, (Appendix 12a and 13a) stated, "McCord is a well-trained intelligent individual provided with *competent counsel.* He was given a fair opportunity at trial to raise all his defenses." It would appear that Petitioner did not have protection *from his own counsel.* The Sixth Amendment to the United States Constitution contemplates counsel as an effective shield against mistaken or over-zealous prosecution. Here Petitioner alleges that his "shield" was spun of gossamer, whose threads were fashioned out of a conspiracy to convict.

Petitioner's defense counsel, prior to trial, also attempted to coerce Petitioner into pleading guilty, to rely on the promise of executive clemency, not to testify at the trial, and to falsely allege that the Central Intelligence Agency was responsible for the break-in. Petitioner informed the trial judge seven days prior to trial that he was discharging counsel. When the trial judge stated that no continuance would be granted, Petitioner rehired counsel five days before trial, having no choice but to go to trial with an attorney in whom he

did not have confidence or complete trust (Appendix 7 page 49a), or to go to trial with no Counsel at all.

Petitioner did not trust the prosecution, the Federal Bureau of Investigation, the Attorney General, and others he knew to be engaged in the cover-up effort (Appendices 3 through 9). Petitioner did, however, disclose to the Central Intelligence Agency and to John J. Caulfield, a high law enforcement official of the Treasury Department, prior to and during his trial, the role of John Mitchell, John Dean and Jeb Magruder in the Watergate planning (Appendices 6, 7, 8 and Senate Select Committee, Book I, p. 132-141). Caulfield concealed this information from prosecution, judge, and jury.

Petitioner testified before the Senate Select Committee that, in early October, 1972, at a restaurant at 1820 "M" Street, N.W., Washington, D.C., his attorney, Alch, told him that he had just come from a meeting in the office of William O. Bittman, E. Howard Hunt's attorney. Alch instructed Petitioner, "Nobody gets up on that stand.". In return, Alch said, "All the men are to be given executive clemency, money while in prison and rehabilitation afterwards.".

Further, Petitioner was contacted during October and November, 1972 by both E. Howard Hunt and Mrs. Hunt and told that all defendants would receive executive clemency, money while in prison and rehabilitation afterwards. Both Mr. and Mrs. Hunt stated that they had been given this message by their attorney, William O. Bittman.

John Mitchell was indicted in March of 1974. Count I charged him with telling John Dean in early January, 1973 to convey a promise of executive clemency to

James McCord, Petitioner. Mr. Mitchell was convicted on this Count and others on January 1, 1975.

Petitioner had refused to accept funds, allegedly for legal fees and support money, which he believed were intended to purchase his silence. These funds were to have been covertly delivered to him on the evening of September 19, 1972 by Mrs. Hunt at the Lakewood Country Club. The following week, Petitioner's defense counsel, Alch, telephoned Petitioner and wanted to know why Petitioner had not accepted the money. How did Alch know that Petitioner had refused to accept this hush money? Petitioner, at a meeting with his attorney, Alch, on October 4, 1972, was advised to accept the money.

As recently as January 6, 1975, after a two-year search, Petitioner finally obtained, from the Senate Select Committee files, a copy of a letter dated September 18, 1972 from Earl Silbert, Prosecutor, to Gerald Alch, Petitioner's attorney. A copy of this letter is attached as Appendix 2 (p. 37a). The circumstances regarding the equipment described in that letter are as follows: In early September, 1972, Prosecutor Silbert had approached John Albert Johnson, Esquire, Alch's assistant, who represented Petitioner at his arraignment, stating that he believed that McCord had some electronic equipment in his possession and wanted it turned over to the prosecution and that it would not be used against Petitioner at trial. Johnson had advised the Petitioner that the prosecution wanted the equipment only to impress the Democrats with the thoroughness of their investigation. Petitioner insisted on a letter from Silbert guaranteeing that the equipment would not be used in evidence against him. Johnson called Petitioner on September

14, 1972 and stated that Silbert had agreed to Petitioner's conditions and had sent a letter to that effect to Alch. On September 15, 1972, Petitioner, in reliance on the agreement, delivered the equipment to the prosecutor. At no time did Petitioner deal directly with the Prosecutors on this matter. During trial, the prosecutors wheeled the equipment out, laid it on the exhibit table, and proceeded to enter it into evidence, without objection by Alch, in violation of the agreement. Petitioner became angry with his attorney and demanded to see the letter from the prosecution which Petitioner had never seen. Alch denied the existence of such a letter. Defense attorney Alch, by stipulating to the admission of the equipment into evidence, was actually enhancing the chances for conviction of his client, the Petitioner. It is apparent that the prosecution and Petitioner's attorney, Alch, were in collusion to deceive and coerce Petitioner into turning this equipment over to the prosecutor and then, against Petitioner's will and without advising him of his rights against self-incrimination, to enter the equipment into evidence at the trial.

In a 31-page response to Special Watergate Prosecutor Jaworski by Silbert in March 1974, responding to A.C.L.U. brief of 100 pages alleging misconduct by Silbert and Glanzer, the report on pages 13-14 states that the prosecution never had any intention of charging a member of Petitioner's family in regard to concealment of the equipment, as Petitioner had been led to believe at the time by his attorney, but the prosecutor further states, "the threat worked, . . . and we received the material." (Appendix 4 page 40a.)

Chief Judge Bazelon, in his opinion, Part II, states that McCord was not prejudiced in any way by the

actions of the government and further states on page 15 that there is insufficient evidence to even require a hearing as to whether there was governmental misconduct or whether McCord was denied the effective assistance of counsel. This conclusion is difficult to reconcile with the Fifth Amendment right of an accused not to be compelled in any criminal case to be a witness against himself. The privilege extends to any records or objects within the accused's possession which might incriminate him.

Included as Appendix 3 is a memorandum from Alch's assistant, John Albert Johnson (JAJ), which was obtained by Petitioner on January 6, 1975 from the Senate Select Committee Archives. This document shows that Petitioner, even prior to trial, wanted to appear and testify before the grand jury.

The term "assistance of counsel" has long been held to mean effective assistance. *Neufield* v. *United States,* 73 App. D.C. 174, 117 F.2d 375 (1941); *Thomas* v. *District of Columbia,* 67 App. D.C. 179, 90 F.2d 424 (1937).

Statements made by John Dean in his Senate Select Committee testimony, pp. 974-76, Book 3, show clearly that Petitioner's counsel kept the White House informed before and during trial of Petitioner's intentions regarding testimony and trial plans. Alch, in testimony before the Senate Select Committee, admittedly kept Paul O'Brien, Mitchell's C.R.P. attorney, advised all during McCord's trial. None of this was authorized by Petitioner.

Dean's testimony further indicated that Petitioner's trial counsel improperly met with John Mitchell and others to discuss problems with Petitioner who was refusing to go along with the Administration's plan

to have Petitioner plead guilty, accept executive clemency, and, above all, remain silent. Petitioner states that in the afternoon of January 8, 1973, Alch took him to the offices of William O. Bittman, Hunt's attorney, where, after conferring privately with Bittman, Alch told Petitioner that he would be getting a call that evening from someone in the White House whom he had known. That night he received a call, and was urged by a man who was later identified as Anthony Ulasewicz, to plead guilty, in exchange for which he would receive executive clemency, money while in prison, and a job after his release. The call from Ulasewicz was the beginning of an involved series of 13 contacts with him by Ulasewicz and John Caulfield, who attempted to get him to plead guilty and otherwise keep silent (S.S.C. Hearing Book I, pp. 132-41). All of this, Petitioner refused to do. On page 1001 (S.S.C. Tr., Book 3, *Supra*), John Dean testified that on March 22, 1973, at a White House luncheon, "Mr. Mitchell raised the fact that F. Lee Bailey . . . has been very helpful in dealing with McCord . . . ", as he needed a White House favor from Haldeman.

Alch testified that he kept his partner, F. Lee Bailey, fully informed of his daily discussions with Petitioner (Senate Select Committee Tr., pp. 2335-40). Dean further testified that, on January 10, 1973, O'Brien and Mitchell both called him and remarked that Petitioner "was becoming an increasing problem" and that his lawyer, Alch, "had lost rapport with him." John Dean testified, "It was on January 10 (1973) that I received calls from both O'Brien and Mitchell indicating that since Hunt had been given assurance of clemency and that those assurances were being passed by Hunt to the others, *that Caulfield should give the same*

assurances to McCord, who was becoming an increasing problem and *again I was told that McCord's lawyer was having problems with him. Both O'Brien and Mitchell felt that McCord might be responsive to an assurance from Caulfield, because Hunt, Bittman, and his lawyer, Alch, had lost rapport with him.* I told Mitchell I would do so.". "On January 11, I received a call from O'Brien, who asked me if the message had been delivered by Caulfield. I told him that it had. *He told me he was keeping Mitchell posted and requested that I keep him posted. O'Brien said that we need a firsthand report, a firsthand reading on McCord from someone he will talk with, because he is not talking openly with his lawyer about what he plans to do* . . . ". (SSC Hearings, Book 3, pp. 973-74). How did they know this?

It is obvious that Petitioner's counsel was part of the conspiracy to obstruct justice in this case by his acts and funneling of information obtained from Petitioner to the White House. If John Dean's testimony is to be believed and, in the past there appears to have been no reluctance on the part of the Special Prosecutor's Office to believe him, Messrs. Alch and Bailey were attempting to keep Petitioner quiet in return for White House assistance on their own unrelated legal problems. Petitioner now believes that Bailey and Alch actually received substantial cash payments, besides legal favors from John Mitchell and the Committee to Re-elect the President, and that a thorough and exhaustive investigation would confirm this.

The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted *solely* to the interest of his client. "The right to have assistance of counsel is too fundamental and absolute to

allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.", *Glasser* v. *United States*, 315 U.S. 60, 62 Sup. Ct. 457, 86 L.ed. 680 (1941).

Lawyers themselves, without benefit of instructions from court, are aware of this duty: "Against a 'hostile world', the accused finds in his counsel a single voice on which he must be able to rely with confidence that his interests will be protected to the fullest extent consistent with the rules of procedure and the standards of professional conduct." (American Bar Association Standards Relating to Prosecution Function and Defense Function (Approved Draft 1971, page 146.)

It is clear from the foregoing that Petitioner did not have effective assistance of counsel at his trial. Effective assistance of counsel requires nothing less that the undivided loyalty of counsel to his client, *U. S. ex rel Plotts* v. *Myers*, 253 F. Supp. 23 (E.D. Pa. 1966) *Atilus* v. *U.S.*, 406 F. 2d 694 (5th Cir. 1969).

Chief Judge Bazelon, in the opinion below, states that he has addressed Petitioner's claim that he was denied the effective assistance of counsel and finds this ground for reversal is without merit. Chief Judge Bazelon further states that the Petitioner's allegations, taken as true, do not make a case for disloyalty or conflict of interest, and that Petitioner's claim of ineffective assistance of counsel is without merit (Appendix I, p. 31a-33a).

It is submitted that if an accused's attorney is engaged in a criminal conspiracy, as is evident here, there can be no effective assistance of counsel. Mr. Justice Douglas, writing for the majority in *Argersinger* v. *Hamlin*, 407 U.S. 25, 31, 32 L.Ed.2d 530, 92

S.Ct. 2006 (1972), stated, ". . . assistance of counsel is often the requisite to the very existence of a fair trial . . . ".

As Judge Irving R. Kaufman said in the decision of the Court of Appeals for the Second Circuit in May 1973, "We have said that our duty in this case is owed not only to the parties involved . . . but to the public as well . . . these interests require the Court to exercise its leadership to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process. . . . *The dynamics of litigation are far too subtle, the attorney's role . . . is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case.*" (Emphasis added) (*Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2nd Cir., 1973).

The Chief Justice of this Honorable Court said that, in order for the wheels of justice in our adversary system to grind true, it is not only necessary to have a strong trial judge, but also mandatory that the trial judge be assisted in the truth finding process by a competent and ethical prosecutor and defense lawyer.[1]

III. THE ACTION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN FAILING TO REVERSE THE TRIAL COURT WAS SO REPUGNANT TO CIVILIZED NOTIONS OF CRIMINAL JUSTICE AND TO THE FUNDAMENTAL FAIRNESS DOCTRINE THAT IT SHOULD NOT BE PERMITTED TO STAND.

The court below stated that ". . . serious prosecutorial misconduct during his trial," was the most important contention of Petitioner. It is Petitioner's con-

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[1] Address by Chief Justice Warren E. Burger, Second Plenary Session, American Bar Association Annual Meeting, July 16, 1971.

tention that this issue was one of the most important raised below if the definition of prosecutorial misconduct means "governmental misconduct." As previously shown under I(a.) herein, at the time of Petitioner's trial officials of the United States Government, including the President, had exculpatory evidence pertaining to the guilt or innocence of the accused but failed to provide it as required by *Brady* v. *Maryland, supra;* that officials of the United States Government, including the Counsel to the President and the then Director of the F.B.I., destroyed exculpatory materials; that government officials knew that perjured testimony was to be used and was used at Petitioner's trial; that government officials engaged in a conspiracy with Petitioner's attorney in derogation of Petitioner's right to a fair trial; and that government officials in conspiracy with Petitioner's counsel, violated Petitioner's Fourth, Fifth, and Sixth Amendment rights by introducing at trial the equipment illegally obtained and after agreement not to do so.

Petitioner readily concedes that some of the information presented in the foregoing portions of this Petition, was not available to the Court of Appeals. However, sufficient portions were available so as to require, as a minimum, the Court of Appeals remanding the case for an evidentiary hearing on those issues raised by such information.

Petitioner believes that the "denial of effective assistance of counsel" issue raised in the lower court in a post-trial motion, in the Appeals Court and in this Court, is one of his most significant contentions. *Had Petitioner had effective assistance of counsel below,* as required by the Constitution and supporting judicial decisions, there is no question but that *most*

of the issues raised herein would have been raised in the trial forum.

It is significant that the Court of Appeals refused to rule on any of the Petitioner's claims presented with the exception of "claims relating to Judge Sirica's conduct of the trial", unless it determined that the lower court's failure to so rule was plain error (page 6, Appendix I). Petitioner had thoroughly informed trial counsel of all material events leading up to his trial from the time of his employment. This information, of which Petitioner's counsel had been fully apprised by Petitioner included, 1) the involvement of the former Attorney General, White House Counsel, John Dean and other high government officials and their express approval of the Watergate operation; 2) that Jeb Magruder was going to and did commit perjury at Petitioner's trial and 3) that bribery attempts were made to Petitioner and other defendants in the form of promises of executive clemency and cash payments.

An examination of the trial transcript reveals that Petitioner's trial counsel did not use this significant information to establish a viable defense, or to impeach the government's case in chief. There is no plausible manner in which this pattern of attorney conduct can be ascribed to "trial strategy" or "trial tactics". Only two explanations remain. The first is Petitioner's counsel displayed an ineptitude that bordered on gross negligence and hence, warrants a new trial; or secondly, that Petitioner's counsel engaged in collusion and conspiracy with those who sought to convict Petitioner, thus limiting the trial and protecting higher-ups, all of which reduces the trial to an evil mockery of justice. This second explanation is buttressed by the actions of Petitioner's counsel in fraudulently

inducing Petitioner to surrender incriminating physical evidence, the electronic equipment, and permitting it to be utilized at Petitioner's trial against him in derogation of Petitioner's Constitutional rights.

It is not necessary that the Court choose between these alternative explanations since either would entitle Petitioner to a new trial. It is inconceivable that the court below could hold that this ineffectiveness of counsel issue was without merit. It is interesting to note that Chief Judge Bazelon stated "We have no quarrel with McCord's assertion that disloyalty or conflict of interest may . . . result in the denial of effective assistance of counsel . . . ." He further, in a footnote, pointed out the holdings of this Circuit concerning this claim provide that "any factual allegations which, if taken as true, establish a substantial violation of the right to effective assistance of counsel will require a hearing." (p. 29, 30, Appendix I).

The Appellate Court properly stated the law and then proceeded to disregard it in the Petitioner's case.

Thus, the decision of the Court below must be reversed.

IV. THE PETITIONER'S CONVICTION WAS THE PRODUCT OF AN ENTRAPMENT BY THE HIGHEST OFFICIALS OF THE GOVERNMENT WHO INDUCED PETITIONER, TO COMMIT AN ILLEGAL ACT; THEN, HE WAS PROSECUTED BY THE SAME GOVERNMENT WHOSE HIGH OFFICIALS HAD RECRUITED HIM IN THE FIRST INSTANCE.

From the testimony previously cited to the Court in this Petition a legal proposition emerges that the government that recruited and directed the Petitioner to perform the acts for which he was convicted is the self-same government that prosecuted him for those acts. This is Constitutionally impermissible.

This Court now has adopted the language of Mr. Justice Brandeis' dissent in a 1929 decision on entrapment: "The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission." (See *Casey* v. *United States,* 276 U.S. 413, 72 L.Ed. 632, 48 S.Ct. 373 (1929) and *Sorrells* v *United States,* 287 U.S. 435, 77 L.Ed. 413, 53 S.Ct 210 (1932).

V. THE GRANTING OF THE PRESIDENTIAL PARDON TO RICHARD NIXON RESULTED IN AN INVIDIOUS DISCRIMINATION AGAINST PETITIONER IN VIOLATION OF HIS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

This Court has not yet ruled upon the issue of the Constitutional effect of the Presidential Pardon of former President Nixon upon the rights of other defendants convicted of Watergate-related offenses in terms of denial of equal protection rights under the Fourteenth Amendment to the United States Constitution.

President Nixon was named as an unindicted co-conspirator in the March 1974 Watergate indictments. President Ford, through his agent, Attorney Benton L. Becker, arranged and conveyed in September 1974 an offer of Presidential Pardon to former President Nixon. This offer was accepted and the Pardon was issued covering all offenses from inauguration day, 1969, to August 9, 1974.

The Petitioner does not challenge the legality of the Presidential power to pardon, unless it can be proven to have been corruptly arranged and conveyed. However Petitioner does contend that, in the case pre-

sented, the granting of such a pardon resulted in a Constitutionally proscribed invidious discrimination against him contrary to the equal protection under the law requirements of the Fourteenth Amendment. The master goes free, while the servants and agents are jailed.

As this Court has said, "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered . . . with an evil eye and an unequal hand, so as to practically make unjust discrimination between persons . . ., material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (*Yick Wo* v. *Hopkins,* 118 US. 356, 373, 374, 30 L.Ed. 220, 6 S.Ct. 1064 (1886).

If Petitioner's conviction is allowed to stand, the credo of this Honorable Court, "EQUAL JUSTICE UNDER LAW" has been denied to this Petitioner.

CONCLUSION

If there ever has been a case in which power has been exercised without fundamental fairness and in such a way as to shock the universal sense of justice, it is the prosecution and trial of the Petitioner. Where else in American judicial history has the government engaged in such massive obstruction of justice, illegal concealment of evidence and tampering with defendants and so corrupted and tainted a trial? One need look only to the Ellsberg case, minor by comparison, in which Judge Byrne said in dismissing the case, "The totality of the circumstances of this case offend a sense of justice. The bizarre events have incurably infected the prosecution of this case." (*U. S.* v. *Russo, et al.,* Crim. No. 9373, WMB-CD, Calif. 1973).

Many of the facts and contentions stated in this Petition were not available to the Petitioner, to the trial judge, or to the Court of Appeals below and, thus, it could be argued that such facts should not be considered by this court.

It is submitted that this court, in the interest of justice for an accused, is not required to consider the case in a vacuum in view of the vast amount of pertinent factual information that has come out since the trial of the Petitioner in January 1973. Much of the factual information that has been disclosed since the trial was the direct result of Petitioner's letter of March 19, 1973 to Judge Sirica which caused others, such as John Dean, to come forward two weeks later and testify. Petitioner's testimony, as its first witness before the Senate Watergate Committee, in March 1973, was considered by many, at the time, to be preposterous and sheer fabrication, yet every single substantial allegation of Petitioner has been confirmed. To the extent that these facts, confirmed after the trial, bear on the issues herein, it is submitted that they must be considered by this court or, at the very least, the case should be remanded to the U. S. District Court for an evidentiary hearing.[2]

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[2] Petitioner moved the trial court prior to the November 9, 1973 imposition of sentence for an evidentiary hearing regarding lack of effective representation of counsel, perjury by government witnesses Magruder and Porter, concealment of evidence by White House officials, and the illegal government wiretapping of Petitioner's telephones. The wiretapping was during the period from June 17, 1972 through April 1973 and there was clear and convincing evidence that Petitioner's telephones were tapped. Petitioner had fifteen witnesses available to testify, but the trial judge denied the requested evidentiary hearing.

An argument made by counsel J. S. Black before the Supreme Court in the 1866 case of *Ex Parte Milligan* would seem particularly applicable in Petitioner's January 1973 trial. He told the Court, "Our fathers were not absurd enough to put unlimited power in the hands of a ruler and take away the protection of law from the rights of individuals. It was not thus that they meant to secure the blessings of liberty to themselves and their posterity. But our wise forefathers knew that tranquillity was not to be always anticipated in a republic . . . especially in prosecutions for political offenses, *where the whole power of the Executive is arranged against the accused party.*" (*Ex Parte Milligan,* 4 Wall 2 (1886)).

The passions of political strife will tend to be dispelled with time, but our concepts of a fair trial and fair play will remain with us, we trust, forever.

Petitioner fully recognizes that the probable response of the Special Prosecutor's office to this Petition will be that it improperly raises issues that were never considered previously by either the trial court or, more appropriately, in the court below. This, taken in context with the action of the trial court in denying Petitioner's request for an evidentiary hearing prior to imposition of sentence, can only be replied to in the words contained in the admonition of Jesus Christ to interpreters of the law in *Matthew,* 23: 24 when he said, "Blind guides! Ye strain out a gnat and swallow a camel!".

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United

States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted.

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February 10, 1975

APPENDIX

APPENDIX 1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2252

UNITED STATES OF AMERICA

v.

JAMES W. MCCORD, JR.
A/K/A EDWARD J. WARREN
A/K/A EDWARD J. HAMILTON, APPELLANT

Appeal from the United States District Court
for the District of Columbia

(D.C. Criminal No. 1827-72)

Decided December 12, 1974

Bernard Fensterwald, Jr., and *William G. Ohlhausen*, for appellant.

Sidney M. Glazer, Counsel to the Special Prosecutor with whom *Leon Jaworski*, Special Prosecutor, *Philip A. Lacovara*, Counsel to the Special Prosecutor *Maureen E. Gevlin*, *David H. Kaye* and *Robert L. Palmer*, Assistant Special Prosecutors were on the brief, for appellee.

Before: BAZELON, *Chief Judge*, WRIGHT, MCGOWAN, LEVENTHAL, ROBINSON, MACKINNON, and WILKEY, *Circuit Judges*, sitting *en banc*

Opinion for the Court filed by *Chief Judge* BAZELON.

Concurring Opinion filed by *Circuit Judge* MACKINNON.

BAZELON, *Chief Judge*: James McCord was arrested by Washington, D.C. police with four other persons at approximately 2:00 a.m. on June 17, 1972 in the offices of the Democratic National Committee at the Watergate Office Building. McCord had on his person or in his control documents removed from the files of the Democratic National Committee, burglary tools, electronic wiretapping and eavesdropping devices and a small mace dispenser. Along with G. Gordon Liddy, McCord was tried before a jury commencing on January 8, 1970 and was convicted on January 30 of three counts of illegal interception of oral and wire communications,[1] two counts of possession of intercepting devices,[2] two counts of burglary,[3] and one count of conspiracy to commit the foregoing offenses.[4] He has filed a petition seeking collateral relief from that conviction as well as an appeal from the sentence entered by the District Court on November 9, 1973.

We affirm McCord's conviction in its entirety. In Part I of our opinion, we discuss certain procedural issues created by the pendency of both an appeal and a petition

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[1] *See* 18 U.S.C. § 2511(1)(a) (1970).

[2] *See* D.C. Code, tit. 23, § 543(a) (1973).

[3] *See* D.C. Code, tit. 22, § 1801(b) (1973).

[4] *See* 18 U.S.C. § 371 (1970). Judgment was entered and sentence imposed on November 9, 1973. United States v. McCord, Crim. No. 1827-72 (D.D.C. filed Nov. 12, 1973).

for collateral relief. (Pp. 3-8). In Part II, we review McCord's claim that he deserves a new trial on the basis of newly discovered evidence and his claim that he has been subjected to a selective prosecution. We conclude that he has no valid defense to which this newly discovered evidence would be relevant (pp. 8-11) and alternatively, that the newly discovered evidence would not create a reasonable doubt about McCord's guilt. (Pp. 11-16). We furthermore hold that he has not timely asserted and has therefore waived his claim of selective prosecution. (Pp. 16-17). In Part III, we consider McCord's claim that Judge Sirica's allegedly "inquistorial" conduct of McCord's trial is grounds for a new trial. We conclude that this claim is without merit. (Pp. 17-22). In Part IV, we proceed to review McCord's most important contention: that serious prosecutorial misconduct during his trial was so repugnant to civilized notions of criminal justice that his indictment should be dismissed. We reject this contention. (Pp. 22-28). Finally, in Part V, we address McCord's claim that he has been denied the effective assistance of counsel and find this ground for reversal is without merit. (Pp. 28-33).

I. *The Procedural Context of McCord's Claims of Error.*

On June 8, 1973, better than four months after his conviction and five months before his sentence, McCord moved the District Court for relief "in the nature of" a writ of error *coram nobis*, seeking a new trial on various grounds and also, in the alternative, a judgment of acquittal.[5] While *coram nobis* is available to McCord

[5] Presumably McCord did not file a motion for judgment of acquittal under Fed. R. Crim. P. 29(c) and motion for a new trial under Rule 33 because he had failed to make such a motion within 7 days after the jury rendered its verdict.

Prior to trial McCord moved for disclosure of electronic surveillance on either himself or his attorneys. On appeal

in these circumstances,* we take, as does the Special Prosecutor, the part of his motion requesting a new trial on the basis of newly discovered evidence as filed

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he contends that his rights under the Fifth and Sixth Amendments were violated by the District Court's refusal to order a file search to ascertain whether there had been such surveillance. This ground for appeal is without merit. The government did conduct a file search to determine whether there had been any electronic surveillance of McCord himself and the District Court ordered appropriate affidavits be filed to attest to this file search. The Chief Prosecutor submitted an affidavit that he had at no time requested electronic surveillance of McCord's attorneys. This is a sufficient effort where, as here, the appellant has come forward with absolutely no facts to establish any alleged surveillance on his attorneys nor any dates upon which this alleged surveillance occurred. *See* United States v. Alter, 482 F.2d 1016, 1025-26 (9th Cir. 1973); United States v. Beverly, 468 F.2d 732, 749 (5th Cir. 1972).

* *See* Thomas v. United States, 106 U.S. App. D.C. 234, 271 F.2d 500 (1959); Mathis v. United States, 369 F.2d 43 (4th Cir. 1966) (Sobeloff, J.). *Cf.* Peyton v. Rowe, 391 U.S. 54 (1968). The fact that McCord had not been sentenced at the time he filed the writ is irrelevant since it is indisputably clear that he was going to be sentenced and in any event *coram nobis* is available even after the sentence has run. Morgan v. United States, 346 U.S. 502 (1954).

The pendency of McCord's direct appeal does not moot his claim for collateral relief since only one of his defenses was raised in the trial court and, as will be discussed below, two defenses not raised in the trial court are not plain error. Thus, we are faced with the extraordinary circumstances necessary to consider a petition for collateral relief while the direct appeal is pending. *See* Womack v. United States, 129 U.S. App. D.C. 407, 395 F.2d 630 (1968); Welsh v. United States, 404 F.2d 333 (5th Cir. 1968).

In the discussion that follows we consider the grounds for issuance of a writ of error *coram nobis* as coterminus with the grounds for § 2255 relief or the grounds for issuance of a writ of habeas corpus. This follows from the

under Fed. R. Crim. P. 33 since that Rule permits such a motion within two years of final judgment and may involve a lesser standard of proof than *coram nobis.*[7] The writ is available for that part of McCord's motion seeking a new trial on grounds other than newly discovered evidence or alternatively a judgment of acquittal.[8] However, we construe McCord's major arguments for acquittal as directed to defects in the indictment and thus actually request a dismissal of the indictment and not technically a judgment of acquittal. We see no reason in the nature of *coram nobis* or the principle of collateral relief generally which would prevent *coram nobis* from being used to obtain dismissal of an indictment. Accordingly, we hold that the writ may be properly used to seek dis-

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fundamental precept of collateral relief that such relief "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." Jones v. Cunningham, 371 U.S. 236, 243 (1963), quoted in Peyton v. Rowe, 391 U.S. 54, 66 (1969). We adopted this principle in Laughlin v. United States, 154 U.S. App. D.C. 196, 203, 474 F.2d 444, 451 (1972), despite contrary dictum at n.10 to the effect that *coram nobis* is limited to correction of "factual errors." In *Laughlin* we treated a *coram nobis* petition as a § 2255 petition and reached the merits of certain alleged errors of law in appellant's original trial; we could in the instant case treat McCord's petition as seeking a writ of habeas corpus and under Peyton v. Rowe, *supra*, we could reach the merits of McCord's alleged errors of law. Finding this formality less than meaningful, we simply treat the three forms for seeking collateral relief as coterminus.

[7] *See* 8A Moore's Federal Practise ¶¶ 33.02[3], 33.03[1] (2d ed. R. Cipes 1965).

[8] *See* Morgan v. United States, 346 U.S. 502 (1954); United States v. Keogh, 391 F.2d 138 (2d Cir. 1968); United States v. National Dairy Prod. Corp., 313 F. Supp. 534 (W.D. Mo. 1970).

missal of McCord's indictment.[9] McCord also appeals from the judgment of guilty and sentence entered on November 9.

With the exception of the claims discusssed in Part III *infra*, McCord did not raise any of the claims at trial that he now presses in this appeal. Thus, we cannot decide these claims on McCord's appeal from his sentence unless we find that the District Court's failure to rule on these claims on its own motion was plain error.[10] The individual views of the author of this opinion on the plain error rule are set out in the margin.*

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[9] *See* cases cited notes 6 & 8 *supra*; Note, *Postrelease Remedies for Wrongful Conviction*, 74 HARV. L. REV. 1615, 1619-21 (1961).

[10] Fed. R. Crim. P. 30, 51, 52(b); Silber v. United States, 370 U.S. 717 (1962); Johnson v. United States, 318 U.S. 189, 199-201 (1943); United States v. Atkinson, 297 U.S. 157, 160 (1936). These cases make clear the following propositions: the doctrine of plain error encompasses those errors which are obvious, affect the substantial rights of the accused and if uncorrected would be an affront to the integrity and reputation of judicial proceedings.

We note the relation of the principles of waiver through failure to object at trial to Fed. R. Crim. P. 12(b)(2) which deems waived all defenses to an indictment not presented prior to trial. *See* Davis v. United States, 411 U.S. 233 (1973). Our disposition of the case makes it unnecessary to consider whether McCord's defenses are within the class of defenses covered by Rule 12(b)(1).

* I have recently stated my views on the rationale of the doctrine of plain error and its relation to effective counsel and the responsibilities of the trial judge. *See* United States v. Leonard & Sarvis, 494 F.2d 955, 974-77 (D.C. Cir. 1974) (Bazelon, C. J. concurring in part, dissenting in part). Notwithstanding the lack of authority supporting them, I based those views on my opinions concerning the responsibilities of the trial judge for which there is substantial authority. *See* notes 38 & 41 *infra*. The plain error rulings in this

These various claims, which McCord asserts now on appeal, could be reached under the writ of error *coram nobis*. However, *coram nobis*, like § 2255 and the writ of habeas corpus, may collaterally attack only constitutional or jurisdictional errors or serious defects in the trial either not correctible on direct appeal or where exceptional circumstances justify the failure to appeal on those grounds.[11] Here McCord does appeal on the appropriate grounds but he cannot have us hear the appeal unless the claim is plain error since he did not raise the

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opinion are consistent with my views. In particular the plain error rulings in this case concern novel and extremely doubtful defenses which if properly raised at any time must be supported by their factual predicate as developed by defense counsel. McCord's counsel did not develop any such factual predicate in this case and, therefore, the trial judge is under no responsibility to instruct on these problematic defenses.

I also note the relation of Fed. R. Crim. P. 12(b)(2) and plain error doctrine. I hesitate to include McCord's defenses within the class of defenses which must be asserted prior to trial since that might indicate that those defenses could not be argued to the jury. *See* Rule 12(b)(1): "Any defense . . . which is capable of determination without the trial of the general issue may be raised before trial by motion." The result of holding McCord's defenses within that class might be to restrict argument to the jury on defenses which might give rise to nullification. *See generally* United States v. Dougherty, 154 U.S. App. D.C. 76, 101, 473 F.2d 1113, 1138 (1972) (Bazelon, C. J. concurring in part, dissenting in part). This issue was confronted in United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973). I would avoid the issue until its resolution is necessary to a decision.

[11] United States v. Sobell, 314 F.2d 314, 323 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963) (§ 2255). *See* Kaufman v. United States, 394 U.S. 217, 223 (1969); Hill v. United States, 368 U.S. 424, 428 (1962); Sunal v. Large, 332 U.S. 174, 179 (1947); United States v. Haywood, 150 U.S. App. D.C. 247, 251, 464 F.2d 756, 760 (1972); Tucker v. United States, 138 U.S. App. D.C. 345, 349 & n.26, 427 F.2d 615, 619 & n.26 (1970).

claims below. In order to accommodate the pendency of the appeal and the claim for collateral relief, we apply similar standards to determine whether a claim of error should be reached under principles of plain error and whether that claim may be reached under principles applicable to collateral relief.[12] This ruling relates to a consolidated appeal and is not intended as an *en banc* ruling that any error that might have been noticed on direct appeal under the plain error rule as a ground for reversal also warrants the granting of relief on collateral attack. A conceptually distinct issue is whether McCord has deliberately by-passed his remedies at trial or waived his claim to relief at trial such that he cannot press such a claim on his appeal or in his petition for collateral relief.[13]

II. *The Claims Based on Newly Discovered Evidence and the Alleged Selective Prosecution.*

McCord's motion for a new trial on the basis of newly discovered evidence encompasses three general claims.

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[12] *Compare* sources cited note 10 *supra with* sources cited note 11 *supra.*

[13] *See* Kaufman v. United States, 394 U.S. 217, 227 n.8 (1969); Fay v. Noia, 372 U.S. 391, 438 (1963); United States v. Haywood, 150 U.S. App. D.C. 247, 252, 464 F.2d 756, 761 (1972); United States v. DeFillo, 182 F. Supp. 782, 783 (S.D.N.Y. 1959), *aff'd*, 277 F.2d 162 (2d Cir. 1960). A deliberate by-pass of the orderly procedures of objection at trial and on appeal is equivalent to a waiver and must be judged according to standards applicable to waiver. *See* United States v. Haywood, *supra*, 150 U.S. App. D.C. at 253-54, 464 F.2d at 762-63. Even if we find such a deliberate by-pass or waiver, we might still reach the merits of the claim if the "ends of justice would be served. . . ." *Id.*, 150 U.S. App. D.C. at 253, 464 F.2d at 762. *See* Sanders v. United States, 373 U.S. 1, 16-19 (1963). We consider this last principle co-terminus with the test of plain error. *See* notes 10 & 12 *supra.*

First, he presents a straightforward claim that new evidence which bears on his guilt or innocence has been discovered and standing alone it justifies a new trial. Second, he claims that this new evidence was within the control of the prosecution [11] and thus he deserves a new trial under the principle of *Brady v. Maryland*, 373 U.S. 83 (1963). Third, he claims that the prosecution not only failed to disclose this evidence relevant to his guilt or innocence but actually used perjured testimony to obtain his conviction.

McCord points to four particular areas in which new evidence has been developed which could be relevant to his trial. First, McCord directs our attention to the fact that Jeb Magruder, deputy director of the Committee to Re-elect the President, and Herbert Porter, also associated with that Committee, have both admitted that they perjured themselves at McCord's trial when asked whether they authorized or had knowledge of McCord's illegal entry into the Democratic National Committee offices. Second, McCord notices that former Acting Director of the FBI, Patrick Gray, has admitted destroying materials relating to the authorization of the break-in and that certain persons, possibly including John Dean, Counsel to the President, destroyed the contents of co-conspirator Howard Hunt's safe in the White House, material which also might be relevant to the authorization of the burglary. Third, new evidence has come forward concerning the role of Howard Hunt and Gordon Liddy, co-conspirators with McCord in the Watergate entry, in the White House Special Investigations Unit, evidence allegedly relating to a domestic security justification for the Watergate break-in. Fourth, McCord claims there

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[11] The "prosecution" includes all agencies of the federal government involved in any way in the prosecution of criminal litigation. *See* United States v. Bryant, 142 U.S. App. D.C. 132, 439 F.2d 642 (1971).

is other newly discovered evidence, largely on the various tape recordings of conversations between former President Richard Nixon and his subordinates, which directly implicates John Mitchell, former Attorney-General of the United States, and persons formerly in the White House in the authorization of the Watergate break-in.

McCord's claims relating to the existence of newly discovered evidence and the prosecution's failure to disclose that evidence are really two sides of the same coin and both may be disposed of by the same reasoning. Unless the newly discovered evidence not disclosed by the prosecution would create in either our minds or the minds of the jury "a reasonable doubt about appellant's guilt",[15] neither the existence of newly discovered evidence nor the prosecution's failure to disclose it is grounds for a new trial. In McCord's case, this newly discovered evidence not disclosed by the prosecution is simply not relevant at all to the basic issue at his trial: did he or did he not break-into the offices of the Democratice National Committee with the intent to install or remove wiretaps and in concert with other individuals. Indeed, the evidence on that issue is virtually conceded by McCord. The only possible issue in a new trial to which this this newly discovered evidence could be relevant is a defense that McCord's actions were justified by his belief that the actions were authorized by the Attorney-General of the United States or the Counsel to the President of the United States.[16]

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[15] United States v. Lemonakis, 485 F.2d 941, 964 (D.C. Cir. 1973). *See* Giglio v. United States, 405 U.S. 150, 154 (1972). *Cf.* Chapman v. California, 386 U.S. 18, 23-24 (1967).

[16] McCord does not allege that the fact of authorization is itself a defense, recognizing that United States v. United States District Court, 407 U.S. 297 (1972) rules out any such contention. Rather, McCord's defense is one related to criminal responsibility: that he did not freely choose to do

Assuming *arguendo*, that a reasonable belief in authorization would be a defense to McCord's actions, we find that McCord may not raise this defense via *coram nobis* and we will not reach it on the basis of plain error. In regard to plain error, we find that the factual basis of McCord's claim is not established on the basis of the trial record [17] and therefore the trial judge was not in error in failing to raise the defense on his own motion.[18]

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wrong, or to contravene community standards. Whether there was in fact an authorization for McCord's action is thus not directly relevant to this defense or to a reasonable belief in an authorization. Even if there were no authorization in McCord's case, he could claim "mistake of fact", if it were otherwise clear that a belief in authorization was a defense.

[17] There is insufficient evidence in the trial record to support an instruction that a reasonable belief in authorization could be a defense to McCord's actions. *See* Belton v. United States, 382 F.2d 150, 155 (D.C. Cir. 1967); Axelbank v. United States, 189 F.2d 18 (D.C. Cir. 1951); United States v. Kahn, 381 F.2d 824, 842 (7th Cir. 1967); United States v. Weiler, 458 F.2d 474, 475 (3d Cir. 1972). This certainly militates against any finding of "plain error." *See* United States v. Brettholz, 485 F.2d 483, 490 (2d Cir. 1973); Roper v. United States, 403 F.2d 796, 798 (5th Cir. 1968); United States v. Richardson, 459 F.2d 1133 (D.C. Cir. 1972). *See also* United States v. Bynum, 485 F.2d 490 (2d Cir. 1973); United States v. Marx, 485 F.2d 1179 (10th Cir. 1973); United States v. Murrah, 478 F.2d 762 (5th Cir. 1973); United States v. Grasso, 437 F.2d 318, 320 (3d Cir.), *cert. denied*, 403 U.S. 920 (1971).

[18] For this reason the cases of United States v. Thomas, 459 F.2d 1172 (D.C. Cir. 1972) and United States v. Weiler, 458 F.2d 474, 476 (3d Cir. 1972) are distinguishable. In this connection, we also note that the factual predicate for McCord's defense is even now far from clear. His testimony before the Watergate Committee and the newly discovered evidence discussed in the text both tend to suport the conclusion that McCord at no time believed his authorization was based on considerations of the domestic security of the United States, *see Hearings on Watergate and Related Activities Before the*

And, as will be developed below, the newly discovered evidence relating to the defense is not sufficient to raise a reasonable doubt in either our minds or the minds of the jury about McCord's guilt. In regard to both the claim of plain error and the *coram nobis* petition, we note that a defense of belief in authorization, assumed for purposes of discussion, would in any event not be of constitutional magnitude [19] and therefore its non-assertion by itself does not seriously impair the judicial process or constitute an error automatically reviewable under principles of collateral relief.[20] Furthermore, McCord has presented us with no persuasive reasons why he did not assert this defense at trial such that his failure to so assert this defense should be excused. McCord is a well-trained, intelligent individual provided with competent counsel.[21] He was given a full

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Senate Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess., pt. 1, at 127-28, 173-76, 203 (1973) [hereinafter cited as *Watergate Hearings*]; Trial Tr. at 1031. In light of this factual confusion and the problematic legality of McCord's defense, we find no plain error in the failure to raise the defense *sua sponte*. *Cf.* United States v. Richardson, 459 F.2d 1133 (D.C. Cir. 1972).

[19] *See* United States v. Freed, 401 U.S. 601 (1971); Smith v. California, 361 U.S. 147 (1959); United States v. Balint, 258 U.S. 250 (1922); Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107. There are, to be sure, some constitutional overtones to defenses based on criminal responsibility. *Cf.* Lambert v. California, 355 U.S. 225 (1958); Robinson v. California, 370 U.S. 660 (1962). However, none of these overtones are implicated in McCord's alleged defense. *See* United States v. Moore, 486 F.2d 1139, 1240 (D.C. Cir. 1973) (Wright J. dissenting).

[20] *Cf.* Kaufman v. United States, 394 U.S. 217 (1969); United States v. Tortorella, 480 F.2d 764, 771 (2d Cir. 1973); United States v. Baxter, 492 F.2d 150, 170 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

[21] *Cf.* Nagell v. United States, 354 F.2d 441, 448-49 (5th Cir. 1966); Smith v. United States, 109 U.S. App. D.C. 28,

and fair opportunity at trial to raise all his defenses. It is clear from McCord's own statements that he knew of the possibility of a defense of reasonable belief in authorization and of whatever facts there might be that would support such a claim.[22] Indeed, we would presume such knowledge from his allegation subscribed under oath that he did have a reasonable belief at the time of the break-in that his actions were authorized.

McCord's failure to raise the defense of authorization below is not excused by either the existence of newly discovered evidence or by the efforts of some government officials to coerce him to remain silent and plead guilty. Since the only relevant factual issue is whether McCord reasonably believed that he was acting pursuant to the authorization of the Attorney-General or Counsel to the President,[23] an issue which must be largely determined by reference to facts in McCord's possession at the time of his actions, newly discovered evidence could *a fortiori* have only a tangential relation to this central issue. The newly discovered evidence discussed above does provide much more evidence that McCord was reasonable in believing that his actions were authorized but no more evidence that he actually did believe that his actions were so authorized. This newly discovered evidence is, thus, merely cumulative to evidence that McCord possessed at the time of the burglary[24] and is not sufficient by

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33, 283 F.2d 607, 612 (1960), *cert. denied*, 364 U.S. 938 (1961) (Bazelon, J. concurring).

[22] *See Watergate Hearings* at 125-248.

[23] *See* note 16 *supra*.

[24] *Cf.* United States v. Baker, 139 U.S. App. D.C. 126, 130, 430 F.2d 499, 503, *cert. denied*, 400 U.S. 829 (1970); Smith v. United States, 109 U.S. App. D.C. 28, 283 F.2d 607 (1960), *cert. denied*, 364 U.S. 938 (1961); Thompson v. United States, 88 U.S. App. D.C. 235, 236, 188 F.2d 652, 653 (1951). *See also* Mesaroch v. United States, 352 U.S. 1, 9 (1956) (dictum).

itself to create in either our minds or the minds of the jury a reasonable doubt about McCord's guilt.[25] Our finding on this point also disposes of McCord's collateral contention that his failure to raise the defense below was excused by the prosecution's failure to disclose this newly discovered evidence at the time of the trial.

We furthermore find that the concerted pressures brought to bear on McCord do not justify his failure to even raise the defense of reasonable belief in authorization. McCord alleges that certain government officials offered him clemency and substantial cash payments to remain silent about the involvement of others in the authorization of the burglary or to plead guilty. McCord also alleges that his attorney took part in these efforts. Finally, McCord alleges that even if these pressures were not sufficient to prevent his own waiver, the pressures did affect the actions of co-conspirators Hunt, Liddy and the Cuban-Americans, thus making it difficult for McCord to assert the defense of authorization in face of denials by the other co-conspirators. The short answer to these contentions is the following statement made by McCord, under oath and after receiving the advice of counsel, before the Senate Watergate Committee: "Well, I had many conversations with Mr. Alch [McCord's trial counsel] about the facts in the case, and the other principals involved and the decision of mine as to when to come forward with the information which I did was basically my decision and it was a day at a time decision on my part as to when was the proper issuance time to tell the facts on this case."[26] McCord did tell the facts of the case less than two months after the verdict in his trial in a letter to Judge Sirica and in May testified fully

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[25] United States v. Lemonakis, 485 F.2d 941, 964 (D.C. Cir. 1973).

[26] *Watergate Hearings* at 242. *See also id.* at 140-41, 232, 247.

before the Senate Watergate Committee.[27] He did not plead guilty. There is uncontroverted evidence in the record that McCord never told his counsel that his actions were justified by his belief that those actions were authorized by the Attorney-General or Counsel to the President.[28] Furthermore, as is discussed in Part V below, there is insufficient evidence to even require a hearing as to whether McCord was denied the effective assistance of counsel. Finally, the fact that other defendants might perjure themselves is an insufficient justification for McCord's failure to *even raise the defense* when viewed in light of McCord's statements that the decision not to assert the defense was voluntary. If McCord had made any effort, however, slight, to raise this defense with his attorney or before the District Court, we might take a different view of the matter. Confronted with McCord's own lack of diligence [29] and his own statements that he was not coerced, we can only conclude that McCord knew full well the consequences of his failure to raise the defense and knowingly chose this course of action. We cannot excuse his failure to even raise the defense below and, therefore, no "exceptional circumstances" exist to justify this Court in considering the defense at this time.

McCord's claim relating to perjury at his trial by Magruder and Porter stands on a different ground. That claim incorporates two principles: first, there is the principle of actual prejudice by reason of the use of the perjured testimony and second, there is the principle

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[27] *See* Sentencing Tr. (March 23, 1973), at 3-6; *Watergate Hearings* at 125-248.

[28] *Watergate Hearings* at 296 (Statement of Gerald Alch). *See also id.* at 150, 247, 320-04.

[29] *Cf.* United States v. Crane, 445 F.2d 509, 519 (5th Cir. 1971); Thompson v. United States, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951).

of a fair and honest criminal process. The first principle is not applicable to McCord's case for the reasons discussed above. Even if Magruder and Porter had testified truthfully about their part in the authorization or their knowledge of the break-in, we still would not have a reasonable doubt about McCord's guilt.[30] The second principle is discussed in Part IV below and we postpone our discussion of that principle until that section of the opinion.

We also find that McCord deliberately by-passed his remedies at trial and thereby waived his selective prosecution claim. The claim is that the government has arbitrarily chosen to prosecute only private citizens for violations of the anti-wiretapping laws while not prosecuting government agents who violate the same laws. Alternatively, McCord argues that he was in fact a government agent and that he is the first and only government agent to be prosecuted under the anti-wiretapping laws. McCord does not allege that he did not know of this defense at the time of his trial, yet he did not assert it. Since all the facts upon which this defense is based were known to McCord at trial, he cannot claim that newly discovered evidence has prompted him to raise the defense now. McCord, as was stated above, was given a full and fair opportunity at trial to raise all his defenses. The only real reason McCord offers for this failure

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[30] *See* pp. 11-14 *supra*. Furthermore, as indicated in his letter to Judge Sirica, Sentencing Tr. (March 23, 1973), at 5, and in his testimony before the Senate Watergate Committee, *Watergate Hearings* at 198, 242; *see id.* at 127-29, 138-39, 144, 148, 157, 199, McCord indicated substantial knowledge of Magruder and Porter's perjury and in particular he admitted that he knew both had perjured themselves on the issue of their knowledge and authorization of the break-in. Thus, this evidence was neither newly discovered nor undisclosed to McCord. *Cf.* United States v. Baker, 139 U.S. App. D.C. 126, 130, 430 F.2d 499, 503, *cert. denied*, 400 U.S. 829 (1970).

to raise the defense below concerns the alleged disloyalty of his counsel. However, McCord has not alleged facts sufficient to even require a hearing into his allegations of disloyalty.[31] Finally, the applicability of the defense to the facts of this very extraordinary crime is doubtful, to say the least.[32] While we will not infer a deliberate by-pass or waiver of remedies at trial from a silent record, this record conclusively demonstrates that McCord knew of the defense and intelligently chose not to assert it. There is thus no plain error in the failure of the District Court to consider the matter on its own motion.

III. *Claims Relating to Judge Sirica's Conduct of the Trial*

McCord seeks a new trial because, he claims, Judge Sirica exhibited a bias in favor of the prosecution and generally assumed an inquisitorial role in the conduct of the trial.[33] While McCord does not specify any particular incidents of bias or inquisitorial attitude,[34] a thorough

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[31] *See* Part V *infra*.

[32] *See generally* Washington v. United States, 130 U.S. App. D.C. 374, 401 F.2d 915 (1968); United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973).

[33] McCord made timely objections at trial to certain actions of the trial judge and made a more general motion directed to recusal. *See* Trial Tr. at 1680, 1897, 1995. The issue has thus been preserved for appeal. However, McCord did not comply with the requirements of 28 U.S.C. § 144 (1970) in his motion for recusal. We treat the motion as a motion for a new trial on the basis of Judge Sirica's conduct of the trial. *See* Billeci v. United States, 87 U.S. App. D.C. 274, 184 F.2d 394 (1950).

[34] We have searched the trial transcript for incidents which might support McCord's claim. However, a reading of the transcripts cannot reveal intonations of the trial judge or gestures and actions which might indicate an opin-

search of the record reveals the following significant events at trial which arguably could fall within that description.[35] First, Judge Sirica agressively examined

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ion of guilt. For that we must rely on defense counsel to build a record or at least make some effort to do so. *See* Butler v. United States, 88 U.S. App. D.C. 140, 188 F.2d 24 (1951); Billeci v. United States, 87 U.S. App. D.C. 274, 184 F.2d 394 (1950). McCord has built no such record in this case.

[35] We briefly discuss two specific claims of error relating to Judge Sirica's conduct of the trial. The first concerns Judge Sirica's conditioning of sentence on co-operation with the prosecution. This alleged impropriety in conditioning sentence on co-operation with the prosecution in no way affects the trial on the issue of guilt but at best serves only to vacate the sentence and to remand for re-sentencing. Furthermore, McCord himself was not given a temporary sentence and the allegedly coercive remarks by the District Judge were directed to the other defendants. Even assuming those remarks could potentially have vicariously "coerced" McCord, they clearly did not in this case since McCord began to cooperate with the prosecution before the allegedly coercive temporary sentences were entered. Sentencing Tr. (March 23, 1973) at 3-6; Sentencing Tr. (March 30, 1973) at 20-24.

Judge Sirica did not abuse his discretion in refusing to declare a mistrial after five of the original seven defendants pleaded guilty. McCord offers no evidence or reasons to support his allegation of prejudice and the overwhelming evidence of guilt trivializes any such prejudice. Furthermore, Judge Sirica gave a limiting instruction to the effect that the jury was not to draw any inference from the termination of the cases of the other defendants. *See* United States v. Johnson, 451 F.2d 1321, 1322 (4th Cir. 1971), *cert. denied*, 405 U.S. 1018 (1972); United States v. Broadhead, 395 F.2d 761, 762 (2d Cir. 1968); United States v. Kahn, 381 F.2d 824, 837-38 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967). *See also* United States v. Jones, 425 F.2d 1048 (9th Cir. 1970), *cert. denied*, 400 U.S. 823 (1971); United States v. Restaino, 369 F.2d 544 (3d Cir. 1966); United States v. Chamley, 376 F.2d 57 (7th Cir.), *cert. denied*, 389 U.S. 898 (1967).

Hugh Sloan, Treasurer of the Finance Committee to Re-Elect the President, outside the presence of the jury as to the amounts of money given to McCord's co-defendant, G. Gordon Liddy and, particularly, why part of it was laundered through Mexican banks. Second, Judge Sirica then read to the jury a transcript of his examination of Sloan which included a bench conference with McCord's attorneys. This examination reflected poorly on Sloan's credibility and indirectly called into question the testimony of Magruder and Porter.[36] Judge Sirica also interrupted the closing argument of Liddy's counsel to challenge the statement that "it is conceded" that witnesses Magruder, Sloan, Porter and Odle, another functionary in the Committee to Re-elect the President, are "on the safe side of innocence." Judge Sirica conducted outside the presence of the jury an extensive examination of Hunt and the Cuban-American defendants as to the reasons for their guilty pleas and refused to accept a plea to anything less than all the charges. Finally, during sentencing Judge Sirica indicated that full co-operation with the prosecution might result in lighter sentences.

A superficial review of these events might support the inference that at least Judge Sirica communicated an appearance of inquisitorial attitude inconsistent with notions of a fair trial.[37] However, such a view assumes

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[36] The testimony of Sloan, Magruder and Porter had at best only a tangential relation to *McCord's* case and thus any prejudice to him was surely minimal.

[37] *See* Cinderella Career & Finishing Schools v. FTC, 138 U.S. App. D.C. 152, 425 F.2d 583 (1970); Whitaker v. McLean, 73 U.S. App. D.C. 259, 118 F.2d 596 (1941); Bursten v. United States, 395 F.2d 976, 983 (5th Cir. 1968); United States v. Bukowski, 435 F.2d 1094, 1109 (7th Cir. 1971), *cert. denied*, 401 U.S. 911 (1971); United States v. Tyminski, 418 F.2d 1060, 1062 (2d Cir. 1969), *cert.*

an exceedingly narrow interpretation of the responsibilities of a trial judge. No judge should remain aloof while the prosecution ignores important evidence or, indeed, while the defense fails to explore testimony central to the issues at trial or fails to raise defenses which may exonerate the accused.[38] The judge, like the prosecutor in this respect,[39] is not a passive by-stander in the arena of justice, a spectator at a "sporting event;"[40] rather he or she has the most pressing affirmative responsibility to see that justice is done in every case.[41]

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denied, 397 U.S. 1075 (1970); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435 (1966).

[38] *See* Carrado v. United States, 93 U.S. App. D.C. 183, 193, 210 F.2d 712, 722 (1953), *cert. denied sub nom.* Atkins v. United States, 347 U.S. 1018 (1954); Patterson v. United States, 413 F.2d 1001, 1003 (5th Cir. 1969); United States v. Ramos, 413 F.2d 743, 746 (1st Cir. 1969); United States v. Spica, 413 F.2d 129, 132-33 (8th Cir. 1969); United States v. Ragsdale, 438 F.2d 21, 27 (5th Cir.), *cert. denied*, 403 U.S. 919 (1971). *See also* United States v. Leonard & Sarvis, 494 F.2d 955, 976-77 (D.C. Cir. 1974) (Bazelon, C.J. concurring in part, dissenting in part).

[39] *See* Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bryant, 142 U.S. App. D.C. 132, 439 F.2d 642 (1971).

[40] Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279.

[41] *See* A. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1022 (1974):

> Despite the tendency to describe the American judge as passive or neutral, he is plainly more than a "mere umpire." Rules regarding the admissibility and sufficiency of evidence, the creation of presumptions, and instructions on law are, on their face, judicial controls designed to enforce the state interest in rational fact-finding. They restrict control of the case by the parties and restrain the jury's impulses towards irrationality

There are, to be sure, strict limits on the judge's power to intervene in the conduct of the trial, particularly in the examination of witnesses and the order of presentation of evidence.[42] These limits are premised on the primary role of counsel in the formulation of trial strategy [43] and on the rule that the judge should not communicate to the jury an opinion on the guilt or innocence of the accused.[44] When a trial judge intervenes in the conduct of a trial, we must determine whether the intervention is in pursuit of justice and whether that intervention

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and nullification of law. Moreover, many American judges comment on the evidence, require that witnesses be summoned even when counsel do not call them, appoint experts, suggest defenses to counsel, use the doctrines of "plain error" and "effective assistance of counsel" to intrude upon counsel's control of the case, and apply "harmless error" to excuse counsel's inadequacies.

See generally United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1974).

[42] *See* United States v. Wyatt, 143 U.S. App. D.C. 136, 442 F.2d 858 (1971); United States v. Green, 139 U.S. App. D.C. 75, 429 F.2d 754 (1970); Young v. United States, 120 U.S. App. D.C. 312, 346 F.2d 793 (1965); Jackson v. United States, 117 U.S. App. D.C. 325, 329 F.2d 893 (1964); Blunt v. United States, 100 U.S. App. D.C. 266, 244 F.2d 355 (1957); Peckham v. United States, 93 U.S. App. D.C. 136, 210 F.2d 693 (1954); United States v. Hoker, 483 F.2d 359 (5th Cir. 1973).

[43] *See* Young v. United States, 120 U.S. App. D.C. 312, 346 F.2d 793 (1965); United States v. Cruz, 455 F.2d 184, 185-86 (2nd Cir.), *cert. denied*, 406 U.S. 918 (1972); United States v. Henson, 486 F.2d 1292, 1304 n.13 (D.C. Cir. 1973); Bursten v. United States, 395 F.2d 976, 983 (5th Cir. 1968); United States v. Porter, 441 F.2d 1204, 1213-14 (8th Cir.), *cert. denied*, 404 U.S. 911 (1971); United States v. Tyminski, 418 F.2d 1060, 1062 (2d Cir. 1969), *cert. denied*, 397 U.S. 1075 (1970).

[44] *See* cases cited notes 37, 38 & 42 *supra*.

is consistent with the premises of the limits on intervention.

Judge Sirica's conduct of McCord's trial was consonant with these standards. Concerning the reading of Sloan's testimony, we have held in a companion case involving McCord's co-conspirator, Gordon Liddy, that the reading of Sloan's testimony and the examination that preceded it were a proper exercise of the judicial function. *United States v. Liddy*, No. 73-1565 (D.C. Cir. Nov. 8, 1974), slip op. at 14-25. The examination of the Cuban-Americans and Hunt as to their guilty pleas was undertaken outside the presence of the jury and thus could not have prejudiced the jury's deliberations on McCord's guilt. The statements made by Judge Sirica during sentencing, of course, could not have prejudiced the jury since it had been dismissed. Judge Sirica's interruption of Liddy's closing argument was justified since Liddy had stated a conclusion that nowhere appeared in the record;[45] Judge Sirica did not express an opinion on that conclusion but merely asked whether it had been conceded by the prosecution as Liddy had claimed. In sum, there was no prejudice to McCord by reason of Judge Sirica's conduct of the trial. McCord's contention that he deserves a new trial on that ground is without merit.

IV. *The Claim of Prosecutorial Misconduct.*

McCord next presses upon us the claim that his prosecution was so repugnant to civilized notions of criminal justice that considerations of fairness require either a dismissal of the indictment or a new trial.[46] The basis

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[45] *See* Johnson v. United States, 121 U.S. App. D.C. 19, 347 F.2d 803 (1965); United States v. Mieles, 481 F.2d 960 (2d Cir. 1973).

[46] This claim was not raised below but because of its seriousness and its intimate relation to the integrity and

for this charge is his allegation that the "prosecution" [47] knowingly used perjured testimony against him and engaged in a concerted effort to coerce him to plead guilty and to remain silent as to the involvement of high government officials in the authorization of the Watergate break-in.[48] Submerged in these allegations is the more general claim that the prosecution intended to "cover-up" the involvement of high government officials by prosecuting only McCord and the other defendants and correspondingly not prosecuting persons in the government who allegedly approved the burglary in the first instance. McCord vaguely alleges that he has been prejudiced by these actions but we find no support for this implied allegation.[49]

McCord can point to no precedent other than the recent dismissal of the Ellsberg-Russo indictment on the basis of a burglary of the office of Mr. Ellsberg's psychiatrist by government agents.[50] While that case is of limited

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reputation of judicial proceedings, we decide it on the merits. *See* Donnelly v. DeChristoforo, 416 U.S. 637, 646 (1974); notes 10 & 12 *supra*.

[47] *See* note 14 *supra*. This claim stated in the text is not directed at the conduct of the attorneys who tried this case for the government. Because of our disposition of the case, we have no occasion to reach the issue of whether the definition of "prosecution" should be limited when conduct of the sort alleged herein is involved or when steps are taken to establish a legally independent prosecution force.

[48] McCord specifically alleges that Magruder and Porter committed perjury; that this perjury was known by the Counsel to the President, others in the White House and by persons in the FBI and the Justice Department; that he was offered executive clemency and money in return for his silence or his plea of guilty.

[49] *See* Part II *supra*.

[50] United States v. Russo, Crim. No. 9373 (C.D. Cal. 1973). *See* United States v. Banks, 16 Crim. L. Rep. 2090 (D.S.D. Oct. 9, 1974). *See also* P. Zimroth, Perversions of Justice 297-404 (1974).

precedential value in this Court, we have no doubt that McCord's most general assertion of principle is grounded in respectable authority: *i.e.* serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused. Few cases present the proposition in as bald a form as we have here; generally prosecutorial misconduct is reducible to certain specific errors which arguably may have prejudiced the defendant. Thus, courts have ordered new trials when the prosecution has knowingly used perjured testimony,[51] have reversed convictions when the atmosphere surrounding trial suggests intimidation or reckless disregard of the postulates of a fair trial,[52] have excluded evidence

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[51] Levin v. Clark, 133 U.S. App. D.C. 6, 8, 408 F.2d 1209, 1211 (1967) (Bazelon, C.J.):

> "The rationale of these cases [concerning knowing use of perjured testimony] seems to have been that convictions must not be obtained through prosecutorial misconduct which violates civilized notions of fairness and thereby taints the entire criminal process. Lawless law enforcement should not be tolerated."

See Mesarosh v. United States, 352 U.S. 1, 14 (1956); Mooney v. Holohan, 294 U.S. 103, 112-13 (1935); Levin v. Katzenbach, 124 U.S. App. D.C. 158, 165, 363 F.2d 287, 294 (1966) (Burger, J.); Coggins v. O'Brien, 188 F.2d 130, 139 (1st Cir. 1951) (Magruder, C.J. concurring); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 138-40 (1964). *See also* United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971) (prosecutorial misconduct in systematically excluding Negroes from juries by the exercise of pre-emptory challenges); cases cited and discussed Vess, *Walking A Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J. CRIM. L. & CRIMINOL. 22 (1973); Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEXAS L. REV. 629 (1972).

[52] *Cf.* Irvine v. California, 347 U.S. 144-49 (1954) (Frankfurter, J. dissenting); Rochin v. California, 342 U.S. 165

seized pursuant to unlawful searches partially because of lawless conduct represented by that search,[53] and finally have dismissed indictments where the defendant was entrapped by lawless conduct of police officers.[54] While the principle has found expression in these situations, we see nothing that limits it to such situations: "There is no body of precedents by which we are bound and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected. . . . It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which the [conviction] is to be obtained." [55]

This principle is not strictly limited to situations in which the defendant has suffered arguable prejudice by

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(1952); Powell v. Alabama, 287 U.S. 45 (1932); Mooney v. Holohan, 294 U.S. 103 (1935); Brown v. Mississippi, 297 U.S. 278 (1936). As Justice Frankfurter stated in *Irvine*:

> "This Court has rejected the notion that because a conviction is established on incontestable proof of guilt it may stand, no matter how the proof was secured. Observance of due process has to do not with questions of guilt or innocence but the mode by which guilt is ascertained. . . . [W]hen a conviction is secured by methods which offend elementary standards of justice, the victim of such methods may invoke the Fourteenth Amendment because that Amendment guarantees him a trial fundamentally fair. . . ."

[53] *See* authorities collected in United States v. Calandra, 414 U.S. 338, 356-66 (1974) (Brennan J., dissenting); Olmstead v. United States, 277 U.S. 438, 469-85 (1928) (Holmes & Brandeis, JJ. dissenting).

[54] *See* authorities collected in United States v. Russell, 411 U.S. 423, 436-50 (1973) (Douglas, Marshall, Stewart & Brennan JJ., dissenting).

[55] Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes J., dissenting).

reason of the prosecutorial conduct. This is so because the principle is not one of fairness to the defendant alone but rather, in Justice Brandeis' words, is one designed to "maintain respect for law: . . . to promote confidence in the administration of justice; . . . to preserve the judicial process from contamination. . . . Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal laws the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution." [56]

While this rationale for the principle excludes the strict requirement of proof of prejudice, it does not eliminate consideration of prejudice altogether. The facts of McCord's case offer a good illustration of why prejudice, actual or potential, is relevant to our determination. McCord, as developed in Part II, was not prejudiced in any way in this case by the actions of the government. To a large extent this is due to the fact that McCord was not merely the object of the governmental misconduct but was a participant in it.[57] The operative fact is that this conspiracy, of which McCord was a part, at least for part of the time, was not designed so much to convict private criminals as to prevent additional convictions.

This then is not a case of the end of law enforcement justifying the means, but of the end itself being, not law

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[56] *Id.* at 484-85 (Brandeis J., dissenting).

[57] This is by his own admission in the *Watergate Hearings* at 130-40, 195-98, 242-43.

enforcement, but criminal activity. To remedy the government's breach of its duty "to observe the law scrupulously" [58] so that it may set a proper example for the citizenry we should not exonerate those in the government or associated with those in the government already convicted for that breach of duty but rather we should continue the process of prosecution. We may take judicial notice that this is in fact being done.[59] In sum, we are not here faced with a choice between convicting criminals and decrying lawless government conduct—the two are one and the same in this case and we may achieve both goals by affirming McCord's conviction.

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[58] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis J., dissenting).

[59] The one exception is Richard Nixon who was pardoned by President Ford, see Presidential Proc. 4311, 10 Week. Compil. Pres. Doc. 1103 (Sept. 8, 1974). As to this, no claim has been made to us that McCord's conviction is legally vulnerable because of the pardon, and any legal questions that may arise from the pardon are not sufficiently focused by the adversary process to justify appellate consideration of their validity or substantiality at this time. Apart from his pending challenge to the pardon, see McCord v. Ford, Civil No. 74-1368 (D.D.C. filed Sept. 23, 1974), if appellant McCord has any constitutional claim it can be presented on collateral attack. We neither express nor intimate any opinion on whether any such claim may be non-frivolous. It would require an extension of existing case law on selective prosecution to novel circumstances. *See* Oyler v. Bowles, 368 U.S. 448, 456 (1962). *Compare* Yick Wo v. Hopkins, 118 U.S. 356 (1886); United States v. Falk, 479 F.2d 616 (7th Cir. 1973); United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974) *with Ex parte* Grossman, 267 U.S. 87, 120-21 (1925); State v. McIntire, 46 N.C. 1, 4, 8-9, 59 Am. Dec. 566 (1853); State v. Leak, 5 Ind. 359, 363 (1854); Stetler's Case, 22 Fed. Cas. No. 13,380, at 1315 (C.C. E.D. Pa. 1852); 2 Hawkins' Pleas of the Crown ch. 37, §§ 8-9, at 533-35 (8th ed. J. Curwood 1824). *See also Ex parte* Wells, 59 U.S. 307, 310 (1855) *rendered obsolete in* Gray v. United States, 260 F.2d 483 (D.C. Cir. 1958); United States v. Wilson, 342 F.2d 43 (2d Cir. 1965); Rathbun v. Baumel, 196 Iowa 1233, 191 N.W. 297 (1922).

Despite this persuasive argument, we might still be inclined to dismiss McCord's indictment in order to deter further attempts to select a few hapless individuals to bear the full brunt of criminal activity for which they were only partially responsible.[60] Although other branches of government have already begun the corrective processes which ultimately will purge the government of this past lawlessness, the fact remains that some officials in the government intended that McCord and the other defendants should bear full responsibility for actions which those officials authorized. Such attempts must be deterred by all means available. However, the deterrent effect of the dismissal of an indictment in such circumstances is negligible at best since that grants the offending government officials relief from the pressures which a conviction might impose upon the individuals chosen to bear the full criminal responsibility. The facts of McCord's case demonstrate the wisdom of this postulate since he chose, under threat of imprisonment, to break his silence about the involvement of others in the authorization of the burglary for which he was charged. McCord's claim of error on this ground must, therefore, be denied.

V. *The Claim of Ineffective Assistance of Counsel.*

McCord's final contention is that he was denied the effective assistance of counsel.[61] This claim of ineffective assistance is generically different from the usual claim

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[60] *Cf.* Dixon v. District of Columbia, 394 F.2d 966, 969 (D.C. Cir. 1968). *See also* Yick Wo v. Hopkins, 118 U.S. 356 (1886); United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (*en banc*).

[61] This point was also not raised below. We consider it as plain error because of its seriousness and its intimate relation to the reputation and integrity of judicial proceedings. *See* Dyer v. United States, 126 U.S. App. D.C. 312, 379 F.2d 89 (1967); *cf.* Von Moltke v. Gillies, 332 U.S. 708 (1948).

made in this Court which generally consists of an indigent defendant, court-appointed counsel and an allegation of incompetence.[62] McCord's claim is that his retained,[63] admittedly competent counsel had more loyalty to the White House than to McCord himself and thus did not fully represent McCord's interests.

As a preliminary matter, we have no quarrel with McCord's assertion that disloyalty or conflict of interest may, if substantial and proven, result in the denial of effective assistance of counsel in contravention of the Sixth Amendment.[64] We have little experience with such

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[62] *See, e.g.*, United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973).

[63] The fact that counsel is retained and may be dismissed is not determinative of claims of ineffective assistance of counsel. *See* West v. Louisiana, 478 F.2d 1026, 1032-34 (5th Cir. 1973).

[64] In United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973), we indicated that the ABA Project on Standards for Criminal Justice, Standards Relating to the Defense Function (App. Draft 1971) may be consulted to determine standards of effective assistance of counsel. Standards 1.6 and 3.5 clearly prohibit disloyalty and conflict of interest. *See also* ABA Code of Professional Responsibility, DR 4-101; DR 5-105; EC 7-9, 7-17; DR 7-101(A); H. Drinker, Legal Ethics 103-39 (1953). We have in the past held that joint representation of co-defendants may give rise to a conflict of interest that impairs the effective assistance of counsel, Lollar v. United States, 126 U.S. App. D.C. 200, 376 F.2d 243 (1967); Campbell v. United States, 122 U.S. App. D.C. 143, 352 F.2d 359 (1965). *See* Glasser v. United States, 315 U.S. 60, 70 (1942). We see no reason for limiting the principle of those decisions to situations in which an attorney formally represents co-defendants. *See also* Dukes v. Warden 406 U.S. 250 (1972); United States v. Bell, No. 72-1518 (D.C. Cir. Nov. 1, 1974) at 31-33 (slip opinion); Decker v. United States, 378 F.2d 245, 248-50 (6th Cir. 1967). The Sixth Circuit recently took such a broad view of conflict of interest

claims and thus have not developed any detailed standards to judge their merit. However, accepting even the broadest view of disloyalty or conflict of interest, we do not find that McCord has alleged facts sufficient to justify either a new trial or a hearing on his allegations.[65]

McCord alleges the following facts[66] in support of his contention. 1) His attorney on at least two occasions notified him that persons in the White House intended to offer him and other defendants clemency and financial support in return for his silence;[67] and his attorney later inquired of McCord whether he intended to accept

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in Ray v. Rose, 491 F.2d 285 (6th Cir.), *cert. denied*, 94 S.Ct. 2650 (1974). *Cf.* Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969).

[65] We will not order a hearing on claims of ineffective assistance of counsel when the record on appeal conclusively shows that the appellant is entitled to no relief. *Cf.* Tucker v. United States, 138 U.S. App. D.C. 345, 347, 427 F.2d 615, 617 (1970). Any factual allegations which, if taken as true, establish a substantial violation of the right to effective assistance of counsel will require a hearing. *See* United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973). However, when claims of ineffective assistance of counsel arise at trial, the better practise is for the trial judge to immediately conduct an inquiry into the bases for the claim if it is at all colorable. *Id.* at 1200 n.4.

[66] These facts are controverted but we accept them as true for purposes of this appeal. We disregard McCord's conclusory statements that his attorney was a White House agent or "informer." *See* Decker v. United States, 378 F.2d 245, 250 (6th Cir. 1967).

[67] McCord does not allege that his attorney made the offer or urged him to accept that offer. McCord does allege that his attorney advised him not to take the stand but he admits that his decision to remain silent about involvement of high government officials in the burglary was freely and intelligently made. *See* note 26 *supra; Watergate Hearings* at 242-43.

the offer; 2) His attorney had conversations with John Mitchell, Paul O'Brien and William Bittman (attorney for E. Howard Hunt) and during those conversations McCord's lack of "cooperation" with the White House and his unwillingness to inform his attorney of his plans were discussed; and 3) His attorney unsuccessfully prevailed upon McCord to assert as a defense that the Watergate burglary was a CIA operation, a defense allegedly originating in the White House.

It is apparent that these allegations taken as true do not make a case for disloyalty or conflict of interest. At best they indicate only that McCord's attorney was consulting with the persons who arguably authorized the crime for which McCord was being tried and was allegedly involved in the same conspiracy that McCord himself was involved in,[68] hardly evidence of a conflict of interest. The desire to assert the CIA defense was certainly not indicative of a conflict of interest and, in any event, McCord himself successfully ruled out that defense.[69] McCord's allegations thus reduce themselves to

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[68] *See* note 57 *supra.*

[69] McCord also claims that his attorney should not have asserted the defense of "duress" which was asserted at trial. He argues that his attorney should have asserted the defense of authorization discussed in Part II above. However, these claims do not in any way impugn the loyalty of his attorney since it is just as probable that the cause of the failure to assert the defense of authorization was the attorney's reasonable belief that the defense had no merit, and that McCord did not himself believe that his actions were justified by an authorization. *See* note 28 *supra.* We, of course, will assume prejudice from lack of loyalty, unless the government proves otherwise, United States v. DeCoster, 487 F.2d at 1204, but McCord must first demonstrate that there has been a breach of loyalty in order for that presumption to be operative.

McCord by implication claims that the failure of his attorney to transmit all the details of a plea bargain offer is evi-

the claim that his attorney violated his confidences; however, in the facts of this case, that is not evidence of disloyalty.[70] Even standing alone, such a violation would not be a deprivation of Sixth Amendment rights since McCord himself knew of these violations at the time and there is no allegation as to what confidences were disclosed or whether the information disclosed was given to the U.S. Attorney's office.[71] It follows that the claim of

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dence of disloyalty, since that bargain would have required him to turn state's evidence in opposition to the wishes of those his attorney was allegedly serving. However, McCord, as we have noted in this opinion, had no intention of pleading guilty or breaking his silence until after the trial. This was made clear in his testimony in the *Watergate Hearings* at 232, 242-43. The fact that his attorney transmitted the gist of the offer—an offer of prosecutorial leniency in return for McCord's willingness to testify against others—negatives any implication of disloyalty. The failure to inform McCord that the prosecution was specifically willing to drop all but one charge in return for his testimony may have been attributable to several factors other than disloyalty. In any event, standing alone, this scrap of evidence of disloyalty is insufficient to warrant a hearing.

[70] McCord's attorney violated these confidences, if confidences they be, to individuals with whom McCord had himself spoken in regard to his plans for his defense and whether he would accept the alleged offer of clemency. Furthermore, McCord himself knew that these "confidences" were being violated at the time.

[71] This case is thus wholely different from Hoffa v. United States, 385 U.S. 293, 304-07 (1966); Caldwell v. United States, 92 U.S. App. D.C. 355, 205 F.2d 879 (1953); Coplon v. United States, 89 U.S. App. D.C. 103, 191 F.2d 749 (1951) and resembles more United States v. Zarzour, 432 F.2d 1, 3 (5th Cir. 1970), where the Court noted that the instrusion into the attorney-client relationship had not resulted in any information being passed to the prosecution. The fact that McCord knew of these violations of confidence suggest that the violations were voluntary both on his part and, of course, on his attorney's part. *Cf.* United States v. White, 401 U.S. 745 (1971).

ineffective assistance of counsel is without merit and McCord's conviction on eight counts of burglary, conspiracy and wiretapping must be

Affirmed

MACKINNON, *Circuit Judge* (concurring specially): I concur in the foregoing result. From an analysis of the record I conclude that the evidence of appellant's guilt on the offenses he was tried on was so strong and persuasive that none of his arguments, or the additional facts he refers to, would ever cause or justify a different verdict. Central to this result is my conclusion from all the evidence in the case that it is clear that appellant knew he was working for the Reelection Committee and not for the government. To my mind all his arguments come to naught when that fact is recognized.

While I approve the interrogation of witnesses by the court to test their veracity, and this is not a new position for me, I do not approve of the court reading to the jury the Sloan testimony taken out of the jury's presence. And to the extent that some of the testimony so read to the jury tended to show guilt of additional individuals on additional offenses, such conduct, to my mind, is also improper to the extent that such questioning or evidence disclosed or intimated the existence of other crimes not *necessary or appropriate* to prove the pending indictments. However, a close examination of the above errors does not indicate to my mind that they were sufficiently prejudicial to McCord, in view of his being caught red-handed in the offenses, to support a reversal of the judgment.[1] The court in its trial did not violate any of the substantial rights of the parties. It

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[1] 28 U.S.C. § 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. (Added May 24, 1949, ch. 139, § 110, 63 Stat. 105.)

was not a perfect trial, but few trials are, and a perfect trial is not required.[2]

As for the statement in the majority opinion that officials of the government authorized some of this conduct, I fail to find where the facts in *this record* support that conclusion even though some of the individuals mentioned in this record had *previously* been government officials or employees. Certainly no acting government official authorized the unlawful entry into the headquarters at Watergate in his capacity *as* a government official.

Also, I am not as sure as Judge Bazelon's opinion asserts (*supra*, p. 28) that "past lawlessness" will be purged from the government. What he undoubtedly means is that some of those involved in these *most recent* offenses may be purged. The statute of limitations undoubtedly protects many others from retribution for prior misconduct of a similar nature.[3]

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[2] In Lutwak v. United States, 344 U.S. 604, 619-20 (1953), Justice Minton stated:

> A defendant is entitled to a fair trial but not a perfect one. This is a proper case for the application of Rule 52(a) of the Federal Rules of Criminal Procedure.

That rule provides:

> (a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

[3] The 1972 presidential election was not the first to be plagued with political espionage. In an interview granted to James J. Kilpatrick, former President Nixon reveaeld that J. Edgar Hoover, the Director of the Federal Bureau of Investigation (FBI), had aprised him of certain bugging:

> He [President Nixon] recalled how much he had resented it when he learned that his own offices had been bugged in his 1962 gubernatorial campaign. He also remembered 1968 with equal resentment. "There was not only surveillance by the FBI, but bugging by the FBI,

[Continued]

[Continued]

and (J. Edgar) Hoover told me that my plane in the last two weeks [of the 1968 presidential campaign] was bugged."

Washington Star-News, May 16, 1974, § 1, at 1, col. 1. These bugging offenses were not investigated by Congress or prosecuted.

APPENDIX 2

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE UNITED STATES ATTORNEY

Washington, D.C. 20001

September 18, 1972

Gerald Alch, Esquire
One Center Plaza
Boston, Massachusetts
02108

Dear Mr. Alch:

During the week beginning September 11, 1972, after discussion between Mr. Johnson of your office and myself, Mr. Johnson, after consulting with you, agreed to have the equipment which was received at the residence of your client, James W. McCord Jr., in the early morning hours of June 17th, 1972 about 4:00 a.m.—in Rockville, Maryland, delivered to my office. This delivery was made on the afternoon of Friday, September 15, 1972. In return, it was agreed by myself that the fact of delivery would not be used against Mr. McCord, either in court or otherwise.

I wish to bring to your attention, however, the fact that when the receiver was delivered to my office, it was without the CEI label with its identifying numbers on the front, which, we understand, was on it when received at Mr. McCord's residence. We expect, accordingly, that the label will be delivered.

Sincerely,

/s/ Earl J. Silbert
Principal Assistant
United States Attorney

APPENDIX 3

Memo: McCord—United States v.
From: J.A.J.
Date: 9/19/72

This date the McCord case came on for arraignment in the United States District Court, Washington, D.C. before Judge Sirica Chief Judge of that Court.

I met McCord at 8:30 A.M. at the hotel and instructed him as to the formalities involved in the arraignment. McCord told me at that time that he would like to present evidence to a Grand Jury regarding what he knew about illegal matters having been taken up within the Democratic National Committee. I told him that in my opinion that this would be impossible since in order to do so he would have to incriminate himself under the charges with which he is already charged since all of the information that he would want to give the Grand Jury would have to come from the illegal wiretap. He agreed with me that this would not be appropriate at this time.

McCord also told me that he was in the process of writing a book; that he had completed a temporary manuscript; that he had contacted a publisher and would like to know from this office and Henry Rothblatt whether he could go ahead and publish this thing prior to election day. He told me that he felt that any publication after election day would not be worthwhile monetarily. I told him I could not make this decision for him, but that I would speak to Mr. Alch about it for whatever advice he might wish to give. It would be my considered opinion that he should be discouraged from doing this at this time.

At the arraignment Judge Sirica listened for several hours regarding the questions of bail on Liddy and Hunt and then arraigned the defendants upon which pleas of not guilty were entered. Representing George Liddy was one, Peter L. Maroulis and representing Hunt was one, William Bittman, whose addresses are in the file.

Henry Rothblatt was there representing Bernard L. Barker, Eugenio R. Martinez, Frank A. Sturgis and Virgilio R. Gonzalez.

At that time Motions were considered regarding the severance of Attorneys for the Rothblatt clients, since the Government has contended that there may be conflicts of interest between them. This is apparently because Barker has given some information to the Federal Government so far.

On the conclusion of the Motions on Bail the defendants were arraigned and released on differing bails. Our client was released on the same bail under the same conditions as the D.C. Superior Court bail situation, that is to say, $30,000.00, 10% cash and the same travel restrictions as authorized by Judge Belson. The Judge then ordered that all Motions which were to be filed in the case, that is to say, all Pre Trial Motions were to be filed on or before, 15 days from that date or by October 3, 1972.

This would include Motions for Discovery, Motions to Suppress and Motions for Dismissal of Indictments based upon the previous motions. It was not indicated at that time as to when a trial date would take place as the Judge indicated that would be contingent upon his rulings on the various Motions. At that time Bittman and Rothblatt indicated that they would bring a Motion to Disqualify the Judge, since he also had been the Judge who supervised the Grand Jury proceedings.

Following this, the Court instructed all Counsel with regard to Rule 100, paragraph 10 of the United States District Court Rules regarding extra-judicial statements.

I also, after the arraignment, conferred with Earl Silbert, who told me that he was disturbed by the fact that the labels on the equipment had been missing when delivered to him. I contacted McCord about this who told me that

the labels had been removed after his return from jail after the arrest and that only indicated the name of the manufacture of the equipment. This was brought to the attention of Silbert who agreed to our original understanding regarding the fact that there would be no comment about the delivery of the equipment to him at any time.

Respectfully submitted,

/s/ J. A. JOHNSON

APPENDIX 4

Response of Earl J. Silbert, Principal Assistant U. S. Attorney, to American Civil Liberties Union's Amicus Curiae Brief Criticizing Prosecution

Page 13

"Finally, if Mr. Reisner possessed all the incriminating evidence the Morgan Report implies he did, there was nothing of which we are aware preventing him from coming forward and disclosing this information to the FBI, grand jury, or the prosecutors.

F. *Response to Criticism for Not Obtaining Search Warrant for McCord's Home or Place of Business After His Arrest*

9. The Morgan Report alleges that the prosecutors failed to secure an immediate search of McCord's "nearby" (Rockville) Maryland residence or his place of business. This criticism in a report submitted in behalf of the ACLU is most surprising. For a search of McCord's home or place of business would have been in direct violation of the Fourth Amendment's requirement of probable cause.

It is elementary that no warrant can be obtained to search a person's residence or office unless there is reasonable or probable cause to believe incriminating evidence, fruits or implements of crime, or contraband is present.

Until Baldwin agreed to talk to us on July 5, 1972, the prosecution had no information that any legally seizable evidence was ever at McCord's home. By then—eighteen days after the arrest and twelve days after McCord's release from jail—there was no longer any reasonable basis at all to believe the property was still at McCord's home where Baldwin claimed to have delivered it on June 17th. For this reason, there was no conceivable basis in law for obtaining a search warrant, either on June 17, or July 5, 1972.

Recognizing that there was no basis for a search warrant, (emphasis added) the prosecutors subpoenaed McCord's wife and daughter to the grand jury concerning the items Baldwin delivered. McCord had asserted his Fifth Amendment privilege despite our attempt in the grand jury to elicit his cooperation. Mrs. McCord invoked her marital privilege not to testify. Based on the testimony of Mr. McCord's daughter, other leads were pursued. Only after these proved fruitless did we then advise Mr. McCord's lawyers that if we did not obtain the receiver and walkie talkies Baldwin delivered

to his home, we would charge his wife with obstruction of justice. *We never had any firm intention* of so charging McCord's wife. *The threat worked*, however, *and we received the material.* (Emphasis added)

G. *Response to Criticism for Not Proving at Trial the Ultimate Source of the Mexican Checks*

10. The Morgan Report claims that the prosecutors failed to offer chain-of proof evidence of the ultimate source of the Mexican checks. (Pp. 31-43) The claim is, of course, true. The report, however, weaves together a variety of unrelated facts to try to demonstrate impropriety in the failure of the prosecution to produce the source of the Mexican checks at trial.

The facts are that in the grand jury investigation we did trace the checks to their ultimate source, the donor. Our investigation, however, disclosed no relationship whatsoever of these checks to the Watergate incident until such time as Sloan received them at CRP and turned them over to Liddy. Sloan's receipt, his giving them to Liddy, and the subsequent path followed by the checks and the cash into which the checks were converted, until some of that cash was recovered from the five arrested defendants, were fully explored in detail at trial. To my knowledge, the absence of any relationship of the source of these Mexican checks to Watergate remains as true today as it did when the indictment was returned in September, 1972, or when the case was tried in January, 1973. With respect to possible election law campaign financing violations, the relevant portions of the grand jury testimony from our investigation were turned over in 1972 to the Special Unit of the Fraud Section of the Department of Justice which handles these matters.

Perhaps anticipating the obvious response that evidence beyond that offered by the prosecution at trial was irrelevant to the charges in the indictment, the Morgan Report states that the prosecutor "personally framed the indictment and thereby fixed the limits of the . . . ."

APPENDIX 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re:

WATERGATE INVESTIGATION

Grand Jury Original

Motion for a Protective Order

The undersigned attorney, Peter H. Wolf, a member of the Bar of this Court and of the District of Columbia, respectively moves this Court for a protective order hereinafter described.

The facts underlying and the grounds for this motion are as follows:

BACKGROUND FACTS

Late in the summer of 1972 I received a telephone call from a client I had represented in court in certain matters. He inquired whether he was in danger of violating any law if he had hidden in his possession approximately eight cardboard cartons containing, among other things, the contents of E. Howard Hunt's desk in the White House before the F.B.I got there, including plans to "bug" the Watergate. During that same telephone conversation, in response to my urging that he turn over these documents to people conducting investigations of the Watergate matter, my client indicated a possible willingness to do so and authorized me to ascertain the possibility of obtaining compensation to offset any potential harm to him. I did undertake such investigatory steps and it was necessary, of course, to relate to several people the communication of facts my client had made to me.

Very shortly after this first telephone conversation, I telephoned Principal Assistant U.S. Attorney Earl J. Silbert and told him these facts and received an opinion from

him that he did not think my client was committing any crime. We both specifically discussed in this context possible violation of 22 D.C.Code § 703 (1967). In light of the law and facts known to me, it is my judgment my client has done nothing unlawful in any way. The fact remains, however, that some of the information related above could be used as links in a chain which might tend to incriminate him.

As time progressed, additional facts became known to me through my client and were made known to other people for the purposes aforesaid. These included the facts that my client worked for the Committee for Re-election of the President, that he had been asked to pick up the cartons at the Executive Office Building on the Sunday after the Watergate break-in, that a pass would be waiting for him at the guard entrance, that no questions would be asked when the cartons were removed from the building, and none were.

My attempts to have my client disclose the documents he said were in his possession before the November, 1972 elections were to no avail. Shortly after the election my client informed me that the materials were no longer in his possession, had been turned back over to the Committee for Re-election of the President shortly before the election, and that some of the materials in my client's possession had apparently included the contributors' lists turned over by the Committee in the litigation instituted by Common Cause.

I have been urging my client to cooperate voluntarily with and Grand Jury or Congressional investigations, but without results.

The Current Investigation As It Relates to the Undersigned Attorney

These facts have become known to the United States Attorney's Office. I have been informed that the office wishes to know the name of my client for purposes of the

current Grand Jury investigation into the Watergate bugging and cover-up. I wish to be as cooperative with any pending criminal investigation as possible, but I also wish to be true to my professional integrity and to the ethics of my profession. The question whether the law is such that I am required to reveal the name of my client is by no means clear. The United States Attorney's Office has made available to me its memoranda in the case of Michael Douglas Caddy, No. 72-1658 in the United States Court of Appeals for the District of Columbia Circuit. In footnote 7 of the Motion to Compel Testimony of Grand Jury Witness Michael Douglas Caddy, filed in this Court, the Government concedes that one exception to the general rule that the attorney has no right to refuse to disclose the identity of his client is when the communication to the attorney has previously been revealed, and when revealing the identity of the client might therefore subject him to criminal prosecution. See *e.g., Tillotson* v. *Boughner,* 350 F.2d 663 (7th Cir. 1965); *Baird* v. *Koerner,* 279 F.2d 623 (9th Cir. 1960). This appears to be precisely the situation faced by the undersigned.

In seeking to be cooperative with the United States Attorney's Office and expressing my wish to reveal the identity of my client only if properly ordered to do so by the Court, I had suggested that I be taken into the Grand Jury, given the opportunity to refuse to answer any questions impinging upon my attorney-client privilege, be taken before a Judge of this Court, and then answer questions before the Grand Jury only if ordered to do so by the Court after a proper hearing on the legal issues. I felt that this would most protect my professional integrity. However, on April 18, 1973 representatives of the United States Attorney's Office urged me simply to reveal the name of my client to them and stated that if I refused to answer some questions before the Grand Jury they might seek to have the Court hold me in contempt immediately without first being ordered by the Court to answer and returned to the

Grand Jury for an opportunity to do so. It is for this reason that a protective order is sought so that I will not run the risk of being held in contempt of court without being given an opportunity to answer all proper questions only if ordered to do so.

The legal situation is further complicated by the uncertainty whether the attorney-client privilege exists at all in this case. It could be found that the communications to me were authorized to be communicated to third persons or were communicated to me during the commission and furtherance of a crime. See 97 C.J.S. *Witnesses* §§ 283 i, 285. The undersigned does not know enough about the current Watergate investigation to know whether his client was committing a crime or not and the undersigned has relied for many months on the opinion from the Principal Assistant United States Attorney referred to above. If this situation has changed, I am entitled to adequate time for study and reflection—and indeed, to information—in order to determine whether the attorney-client privilege is applicable. This could not be done within the Grand Jury room or upon being shuttled between the Grand Jury room and a Judge of this Court with the imminent threat of being held in contempt of court for failure to answer questions.

PRAYER FOR RELIEF

WHEREFORE, the undersigned attorney requests this Court to order the United States Attorney not to move for contempt of court against the undersigned until he has been given an opportunity to answer all proper questions before the Grand Jury relating to his aforementioned client *only* after having been ordered to do so by a Judge of this Court after full and fair deliberation upon the legal issues of attorney-client privilege herein raised.

s/ PETER H. WOLF

APPENDIX 6

3841

From time to time I'll send along things you may be interested in from an info standpoint. This is a copy of a letter which went to my lawyer.

With Best Regards,

Richard Helms, Director
Central Intelligence Agency
Langley, Virginia

Personal

48a

3842

Dear

A few interesting bits of information you will be interested in:

1. When Paul O'Brien was engaged by the Committee as their lawyer in this case, the Committee told him that the operation was a CIA operation. He say he did not learn otherwise until one of the defendants told him the facts, and he says he blew up over it.

2. The prosecution, under Silbert, had of course begun that line with Judge Belson from the very first hearing. Altho never coming right out and saying so, it was inferred by him in every hearing that I witnessed, and learned that he did so with the other defendants in the bond hearings.

3. Now that the CIA story has not held water, or more correctly, will not be allowed to stand by CIA, the prosecution is now planning to charge that Liddy " stole the money for the operation from the Committee and in turn bribed McCord and Hunt to participate, giving McCord a $16,000 bribe onone occasion witnessed by a participant who has turned states evidence ".

Rest assured that I will not be a patsy to this latest ploy. They will have to dream up a better one than this latest story. The states witness can not only be impeached on the stand, but can be charged with perjury before the grand jury, and by federal officials(the FBI) if he has made such a statement to them. If Committee officials have alleged that Liddy stole the funds for the operation from the Committee, they also have perjured themselves and are subject to such prosecution. Liddy may sit still for this; I will not.

Recent leaks this week by the prosecution/and or the FBI to the New YORK TIMES still are trying to infer that this was a CIA operation. The frequent use of " ex-CIA agent " in other articles are further evidence. They still haven't given up on this tactic.

As I have mentioned before, I don't think a fair trial is ever going to be obtained in Washington for the reasons I have heretofore stated. The prejudicial press coverage; the high percentage of registered Democratic voters from whom the jury would be picked; and the pro-govt leanings of such a jury, most of whom would be employed by the govt and subject to a bias or duress from the prosecution are only some of the reasons. The matter of timing of a change of venue motion is, I realize best left in the hands of the lawyers. The fact remains that I have lived in Washington since 1942 and know certain things about the District of Columbia from first-hand knowledge, having lived there in the past, that I wanted you to be aware of.

Jim

APPENDIX 7

3837

I have released Mr. Gerald Alch as my defense attorney in the Watergate Case.

In meetings recently in which plans for our defense in the Watergate trial were discussed, he persisted in a proposal that I claim that the Watergate operation was a CIA operation. This is flatly untrue, and when I rejected it, he then went on to make a second proposal.

The second proposal then was that I claim that the 4 Cubans and I cooked up the bugging operation on our own. This also is untrue.

It was patently obvious that in my own interests of a fair trial that I dismiss Mr. Alch and find my self another attorney. I am actively engaged in doing just that.

The implications inherent in these two proposals imply the deepest corruption and perversion of the criminal justice system in recent history. It smacks of total political control of the federal investigative process, the ~~grand jury process~~ federal grand jury process, and the federal prosecutors, ~~in particular~~ especially.

Never in our nation's history has the ~~national security~~ integrity of the national intelligence system ~~been~~ and of the FBI been in such jeopardy.

It forebodes in the present direction of the FBI the return to the politcally corruptive system that Hoover inherited. The fine ~~an~~ organization is already crumbling.

When ~~a dedicated~~ the hundreds of dedicated fine men and women of CIA can no longer write intelligence summaries and reports without fear of politcal recrimination--without integrity, when their fine director is being summarily discharged in order to make way for a politician who will write or rewrite intelligence the way the politicians want them written, instead of the way truth and best judgment dictates, ~~our~~ the nation is in the deepest of trouble and freedom itself was never so imperiled. Nazi Germany rose and fell under exactly the same philosophy of governmental ~~operation~~.

This nation is truly in the deepest trouble it has been in in 200 years.

I fully expect the most intense character assasination campaign and harassment to be mounted against me. So be it. The integrity of ~~our~~ the CIA and of the FBI is far more important than one man's ~~future~~ or life. and of the Federal Criminal Justice System

APPENDIX 8

DEC 29 1972

What is needed:

1. Evidence of illegal govt wiretapping of our telephones, either on national security grounds or domestic security grounds, both of which are done on authority of the attorney general's signature alone.

   a. There were two national security calls by me from our home phone (762-0137). One was made to the Israeli Embassy on and the other was made to the Chilean Embassy on . Both calls were witnessed by my wife.

   b. I am convinced that from at least June 17-early July there was a wiretap on our home and office phones on authority of A/G's signature alone. On June 26, 1972 the Supreme Court declared such wiretaps illegal, and several cases have been dismissed on these grounds recently, rather than disclose in adversary proceedings the contents of such calls and conversations, and the names of the parties involved.

   c. There is no question but that our home and office phones are still being tapped. If done me without a Court order, we are in an excellent position to have the cases dropped. The prosecution has asserted there were not illegal tapped conversations of any kind-national security, domestic security, or court ordered. This is bunk.

      What I need is proof--logs, transcripts or testimony from an FBI agent or two who had monitored such calls.

2. Evidence of perjury or false swearing by Gary Bittenbender, the IRD officer. I know he is lying. Some additional evidence, even circumstantial would help

3. I have the evidence of the involvement of Mitchell and others, sufficient to convince a jury, the Congress and the Press. (EMPHASIS ADDED)
fix.

The maximum effect is accomplished if everything is held until the trial xxx has n just started, and then surface everything at once--showing beyond any doubt the hypocrisy of the whole group and how fixed the whole federal criminal justice system has now become.

APPENDIX 9

October 9, 1973

Massachusetts Bar Association
One Center Plaza
Boston, Massachusetts 02108

Dear Sirs:

Reference is made to my complaint to the Massachusetts bar association dated September 25, 1973, listing the following complaints against attorneys Gerald Alch and F. Lee Bailey:

1. Perjury by Alch before the Senate Watergate Committee.
2. Ineffective counsel by Alch and Bailey before and during the Watergate trial of January 1973.
3. Conflict of interest by Alch and Bailey before and during the trial.
4. Other matters denying me due process of law and proper legal representation by Alch and Bailey.

This is to request an amendment to the above complaint to add the following additional complaints:

5. That Gerald Alch was a party to, and aided and abetted, the harassment and tampering with, a party to a Court proceeding, James W. McCord, Jr., prior to and during the January 1973 Watergate trial, a violation of Title 18 U.S. Code Section 1503.
6. That Gerald Alch was a party to, and aided and abetted acts of bribery committed beginning January 8, 1973, a violation of Title 18 U. S. Code Section 201 (d).
7. That Gerald Alch and F. Lee Bailey were parties to a conspiracy to deny James W. McCord, Jr., his federal civil rights, namely his 4th amendment right against unreasonable search and seizure, his 5th amendment rights to a fair trial and due process, his 6th amendment rights to counsel, and his 14th

amendment right to equal protection of the law, all violations of Title 18 U. S. Code section 241.

The specific acts which constitute the violations cited in paragraphs 5., 6., and 7. are set forth in paragraph 10, page 5, of affidavit of James W. McCord, Jr. filed October 9, 1973 in U. S. District Court at Washington, D. C., a copy of which is attached. An earlier affidavit of August 9, 1973 regarding ineffective counsel by Alch and Bailey is also attached.

Inasmuch as the federal misprision statute requires that a person having knowledge of the commission of felonies communicate such knowledge to a judge and other civil authority, copies of this letter are being furnished to the Chief Judge of the U.S. District Court of the District of Columbia, and to the Director, Federal Bureau of Investigation, Washington, D. C., who is charged with the investigation of violations of the federal statutes cited above. In addition, a copy of this letter is being furnished to the Senate Select Committee on Presidential Campaign Activities inasmuch as it has purview over the perjury committed by attorney Alch in testimony before the Committee in May 1973, referred to in item 1. above. I am available for interview by the Federal Bureau of Investigation and the Senate Select Committee on these matters at any time.

Relevant pages of the sworn testimony before the Senate Select Committee are cited in the motions and affidavits attached herewith. Further relevant material is set forth in an attached Summary of the Case of James W. McCord, Jr. prepared on September 25, 1973 for other purposes, by the writer.

Very truly yours,

JAMES W. MCCORD, JR.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-988

JAMES W. McCORD, JR., PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1974. The petition for a writ of certiorari was filed on February 7, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the public disclosure of the Watergate cover-up conspiracy, a conspiracy in which petitioner participated, constitutes newly discovered evidence which now gives petitioner a defense to his conviction for participation in the Watergate break-in and electronic surveillance and entitles him to a new trial.

2. Whether petitioner was deprived of a fair trial by prosecutorial misconduct.

3. Whether petitioner was denied the effective assistance of counsel.

4. Whether petitioner was entrapped.

5. Whether impermissible prosecutorial selectivity and the pardon granted to Richard Nixon deprived petitioner of the equal protection of the laws.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioner, together with G. Gordon Liddy,[1] was convicted of conspiracy, burglary, illegal interceptions of oral and wire communications, and unlawful possession of intercepting devices, all arising out of illegal entry and electronic surveillance at the offices of the Democratic National Committee at the Watergate office

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[1] Liddy's conviction was affirmed on November 8, 1974, and this Court denied certiorari on January 27, 1975. (No. 74-5678). Codefendants Hunt, Barker, Martinez, Gonzalez, and Sturgis pleaded guilty.

building. The district court denied petitioner's post-trial motion seeking collateral relief based upon newly discovered evidence,[2] and on November 9, 1974, petitioner was sentenced to imprisonment for not less than one year nor more than five years on each of eight counts, the sentences to run concurrently. On appeal, the conviction was unanimously affirmed by the court of appeals, sitting en banc (Pet. App. 1a-36a).[3]

The trial. The evidence of petitioner's guilt at trial was compelling and incontrovertible. Petitioner and four others were arrested by police officers at approximately 2:00 a.m. on June 17, 1972, in the offices of the Democratic National Committee at the Watergate office building. He had on his person or in his control documents removed from the files of the Democratic National Committee, burglary tools, electronic wiretapping and eavesdropping devices and a mace dispenser (Tr. 587-589, 601-604, 659-667, 729-733, 736, 739). At the time of his arrest, petitioner was an employee of a committee for the re-election of the President (Tr. 1347-1349), and he carried out the break-in and surveillance under the

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[2] Petitioner's motion was styled as a petition "in the nature of" a writ of error *coram nobis*, but was treated below as a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure insofar as it sought a new trial based upon newly discovered evidence (Pet. App. 3a-5a).

[3] Petitioner's application for bail pending disposition of his petition for a writ of certiorari (No. A-658) was denied by the Chief Justice on February 10, 1975.

direction of G. Gordon Liddy, also an employee of the committee (Tr. 481, 1406-1409, 1422-1426).[4]

Petitioner previously had hired a former FBI agent to monitor telephone conversations transmitted from the Democratic National Committee from hidden eavesdropping devices. The agent was stationed in a motel room rented by petitioner and utilized equipment purchased by petitioner. All logs of the conversations were delivered to petitioner. (Tr. 909-912, 918-920, 929-934, 949, 1092, 1167, 1513, 1523-1525.) Petitioner had instructed the agent that he was interested in "any conversation involving political strategy and a personal nature—he wanted all conversations recorded" (Tr. 1031).

Post-trial disclosures. On March 19, 1973, shortly before the original date for sentencing, petitioner wrote a letter to the trial judge. He said in part that political pressure had been applied to the defendants to plead guilty and remain silent, that perjury occurred during the trial about the involvement of others and that the perjury was material to the mo-

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[4] On at least two occasions, petitioner also had engaged in attempts to install eavesdropping devices in Senator McGovern's campaign headquarters (Tr. 464-469, 477-482, 942). The principal theory of petitioner's defense at trial was "duress"—that he had committed the acts charged in the indictment as a result of a compelling concern for the safety of the re-election committee personnel and government officials and the possibility of violent demonstrations against campaign activities (Tr. 544-550). The trial court advised counsel that he would not give instructions to the jury relating to this defense (Tr. 1661-1668). Petitioner's defense consisted of three character witnesses.

tivation and intent of the defendants. As to his own motivations, he said that they "were not limited to, or simply those offered in my defense during the trial. This is no fault of my attorneys, but of the circumstances under which we had to prepare my defense."

The Senate Committee testimony. In May 1973, petitioner testified before the Senate Select Committee on Presidential Campaign Activities about the planning of clandestine intelligence activities and his involvement in the Watergate break-in and cover-up conspiracy. In brief, petitioner knew from the outset that Attorney General John Mitchell (soon to become chairman of the Committee to Re-Elect the President) was involved actively in political matters. Liddy, who was in charge of political espionage for the Committee, told him that the Watergate operations were planned in meetings among Liddy, Mitchell, John Dean (Counsel to the President), and re-election official Jeb Magruder, both in the offices of the Attorney General and in the offices of the Committee to Re-Elect the President. According to Liddy, Mitchell wanted a telephone of a senior official of the Democratic party and a room in Democratic headquarters bugged. (Senate 142, 157-158, 172-173, 183, 185.)[5] McCord further testified that although

[5] "Senate" refers to Hearings before the Senate Select Committee on Presidential Campaign Activities on Watergate and Related Activities, 93rd Cong., 1st Sess. (1973), Book 1. Although this testimony was not introduced into evidence below, both parties and the court of appeals below referred freely to the testimony.

he had become involved in the break-in because Mitchell and Dean had authorized it, he never harbored an affirmative belief in the legality of the proposed break-in (Senate 128-129, 174, 176) and knew that the break-in was part of a larger plan for gathering "political intelligence" (Senate 127-28, 203).

Petitioner also disclosed that after the break-in he received $25,000 from Mrs. E. Howard Hunt for the payment of legal fees, that he received his salary through January 1973, and that in the fall, E. Howard Hunt told him that each defendant who pleaded guilty would receive financial support in prison, executive clemency after serving a part of his sentence and perhaps a job after release. Moreover, according to petitioner, during his trial Gerald Alch, his attorney, told him that he would be called by a friend from the White House, who petitioner assumed would be John Caulfield, the person who had recruited him for the Re-Election Committee. Petitioner testified that he subsequently met with Caulfield on three occasions, but refused to discuss a job offer or executive clemency conditioned on a guilty plea and silence and firmly stated that he intended to plead not guilty and fight the case through the courts (Senate 130-131, 134, 138-140).

Finally, petitioner stated before the Committee that in late December 1972, before his trial began, he had determined to tell the true story of Watergate at a propitious time—"it was a day at a time decision on my part as to when was the proper issuance time to tell the facts on this case." According to

petitioner's testimony at that time, Alch never urged him to plead guilty or keep silent, and the decision not to defend the case on the ground of Mitchell's and Dean's involvement was petitioner's. (Senate 150, 242-243, 247.)

The post-trial motion. On June 8, 1973, petitioner filed a motion for a "writ of error coram nobis," asserting that he had newly discovered information wrongfully withheld from him that deprived him of evidence that could have been used to prove his innocence. Specifically, he claimed that he had been lulled by the Department of Justice and White House connections of his superiors into believing that any action he took on their behalf would have the "sanction of legality" (A. 20).[6] While he admitted that he was aware that Magruder had testified falsely at the trial about the involvement of Mitchell and Dean, he allegedly remained silent because his attorney had advised him not to testify. He acknowledged that he knew the general outline of an obstruction of justice designed to cover-up the identity of persons responsible for the break-in, including post arrest payments to defendants, but claimed that he was not fully aware of its extent (A. 17-18, 23-24, 39, 86).[7] In

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[6] "A." refers to the Appendix filed in the court of appeals.

[7] He also stated that he did know of the existence of the White House Special Investigations Unit (the so-called "Plumbers") in which some of his co-defendants participated (A. 15), and claimed that his prosecution represented impermissible prosecutorial selectivity. Petitioner also filed a motion, contending that he and his attorneys were victims of illegal governmental electronic surveillances. The Government

subsequent supporting affidavits, petitioner alleged that Alch had participated in White House efforts to buy his silence and to offer him executive clemency and had advised him that none of the defendants was to testify at the trial (A. 39, 86). On November 7, 1973, the trial court, after hearing argument on petitioner's motion and on motions of five co-defendants to withdraw their guilty pleas, denied him relief.[8]

ARGUMENT

1. Petitioner's initial contention is that the conspiracy by high government officials to obstruct the investigation and prosecution of the Watergate break-in deprived him of due process of law and tainted his trial. Although the underpinnings of his argument are unclear, he apparently contends that the conspiracy—which included perjurious testimony at his trial and efforts to secure his and his co-defendants' silence, for the purpose of concealing the identity of others responsible for the planning of the break-in and other illegal activities—prevented him from asserting a defense that it was his "professed belief that he was engaged in an intelligence gathering operation authorized by the highest levels of government, including the Attorney General, to ascertain planned illegal conduct" (Pet. 10-11).

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conducted a search and filed affidavits denying that there had been any surveillances of petitioner's conversations.

[8] Petitioner's counsel indicated that he thought an evidentiary hearing might not be necessary if Senate testimony could be made part of the record (Nov. 5 Tr. 95).

The simple answer to this argument—and the answer that demonstrates that this case does not present any substantial issue regarding the administration of justice that call for resolution by this Court—is that petitioner, fully aware of the basic facts that he now would present as a defense, deliberately chose not to disclose those facts or press his supposed defense at trial. As he concedes (Pet. 9), he had been told prior to the break-in that Mitchell and Dean had approved the operation. Moreover, he was aware of the perjurious testimony and the payment of hush money. He himself had received $25,000 and proffers of executive clemency and other assistance. By his own admission, however, the failure to assert a defense of authorization was not due to any pressure exerted on him, disloyalty of counsel, or the imagined hopelessness of proving the involvement of "higher-ups."[9] McCord testified under oath before the Senate Select Committee with the advice of counsel (Senate 242-43):

> Well, I had many conversations with Mr. Alch about the facts in the case, and the other principals involved and the decision of mine as to when to come forward with the information which I did as basically my decision and it was a day at a time decision on my part as to when

[9] Petitioner asserts that he had "deep distrust" of White House aides, the FBI, the prosecution and his own lawyers (Pet. 12). He never explains, however, why he waited for more than six weeks after his trial to disclose the facts within his knowledge to the trial judge, instead of going to him during the trial.

> was the proper issuance time to tell the facts on this case. * * * I think my decision has been the right one.

Having deliberately by-passed the opportunity to present his claims at trial, petitioner is not free to press them either on appeal or by collateral attack. See, *e.g.*, *Brady* v. *United States*, 397 U.S. 746 (1970); *United States* v. *Bridges*, 432 F.2d 692 (D.C. Cir. 1970); *Green* v. *United States*, 256 F.2d 483, 484 (1st Cir.), *cert. denied*, 358 U.S. 854 (1958).

The principle thrust of petitioner's contention (Pet 13-20) rests on allegedly newly discovered evidence—the conclusive evidence of the cover-up conspiracy that has come to light since petitioner's trial. He attempts to bolster this argument by relying on *Brady* v. *Maryland*, 373 U.S. 83 (1963), asserting that the prosecution should be charged with failure to disclose the evidence at trial (Pet. 19)[10] The court of appeals discussed this issue at length, and we rely primarily on the opinion below (Pet. App. 13a):

> McCord's failure to raise the defense of authorization below is not excused by either the existence of newly discovered evidence or by the

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[10] There is no basis as we discuss below, for concluding that any of the "new" evidence is exculpatory of petitioner. Moreover, there is nothing in the record or in the petition which supports the charge that the government—as distinguished from those illegally participating in the cover-up conspiracy—violated any duty of disclosure. Indeed, if petitioner had disclosed the information in his possession, it could have served as the key to opening up an earlier disclosure of the information upon which his present claim is based.

> efforts of some government officials to coerce him to remain silent and plead guilty. Since the only relevant factual issue is whether McCord reasonably believed that he was acting pursuant to the authorization of the Attorney General or Counsel to the President, an issue which must be largely determined by reference to facts in McCord's possession at the time of his actions, newly discovered evidence could *a fortiori* have only a tangential relation to this central issue. The newly discovered evidence discussed above does provide much more evidence that McCord was reasonable in believing this his actions were authorized but no more evidence that he actually did believe that his actions were so authorized. This newly discovered evidence is, thus, merely cumulative to evidence that McCord possessed at the time of the burglary and is not sufficient by itself to create in either our minds or the minds of the jury a reasonable doubt about McCord's guilt. Our finding on this point also disposes of McCord's collateral contention that his failure to raise the defense below was excused by the prosecution's failure to disclose this newly discovered evidence at the time of the trial. (Footnotes omitted.)

Finally, it is well settled that neither newly discovered evidence nor obstruction of justice at a trial justifies a new trial unless there is some reasonable likelihood that a new trial would result in an acquittal. See, *e.g.*, *Giglio* v. *United States*, 405 U.S. 150, 153-54 (1972); *United States* v. *Lemonakis*, 485 F.2d 941, 964 (D.C. Cir. 1973). There is no doubt whatsoever about petitioner's guilt or the outcome of

a new trial. If anything, the new evidence confirms petitioner's guilt. McCord was caught red-handed in the Democratic National Committee offices and never has denied that he was a principal operative in the break-in or the electronic surveillance. Instead, in a veiled way he refers to "authorization" at the highest levels of government. Significantly, however, he *did not allege below* that he believed the operation was *lawful*, that it had been approved by anyone *acting as a government official*, or that it was undertaken as a *government operation* or for a *governmental purpose*. In fact, when petitioner was asked the direct question before the Senate Select Committee whether at the time of the break-in he understood it was illegal, he responded, after consulting with counsel: "Yes, of course" (Senate 176).[11]

In brief, it was clear to petitioner at the time of the break-in that the break-in was authorized and engineered as a political espionage tactic without the remotest connection to any governmental purpose. Petitioner has acknowledged that the break-in was

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[11] Petitioner thus is left with the defense that because he acted pursuant to the directions of a government official, whether or not the government official was acting within his authority, and whether or not petitioner believed he was engaged in a legal operation, he lacked the requisite criminal intent. If that were true, the "mere fact" that a government official participated in blatantly illegal conduct would suffice to immunize all other participants from responsibility for their action. Clearly, as decisions of this Court have firmly held, that is not the law, either for government officials, *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), or for those who do their bidding. *Gravel* v. *United States*, 408 U.S. 606 (1972).

part of a larger plan for gathering "political intelligence" (Senate 127-28, 203) and has testified to related instances of politically motivated espionage, including his own attempts to install eavesdropping devices in Senator McGovern's campaign headquarters (Senate 153-54). Petitioner's own admissions, then, serve only to corroborate the evidence at trial that he was fully aware that the break-in and electronic surveillance were part of a political operation designed to monitor "all conversations involving political strategy and a personal nature" (Tr. 1031). This clearly belies any claim that he was engaged in an operation "to ascertain planned illegal conduct" [12] or that there is any conceivable justification for his conduct.

2. The principal claim of prosecutorial misconduct rests on the assertion that the prosecutors knowingly presented false testimony from witnesses Magruder and Porter that no person higher up than Liddy was involved in the break-in (Pet. 21-24). Porter, however, was not asked about the involvement of others (Tr. 1423-1430B). And in offering the testimony of

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[12] Petitioner suggests for the first time that he acted to uncover alleged illegal activity based upon information that the Cuban government was making contributions to the Democratic National Committee (Pet. 8). Petitioner neither alleged this in his motion or affidavits below nor testified to this effect before the Senate Select Committee. As for the claim that the operation was undertaken to discover planned acts of violence directed against the re-election campaign of the President, the defense of "duress" was advanced at trial and properly rejected as a matter of law. See note 4, *supra*.

Magruder, the prosecutors were neither trying to hide the involvement of others nor deliberately offering false testimony. Contrary to petitioner's assertion, Hugh Sloan, the former treasurer of the Re-Election Committee never "informed the prosecutor of Magruder's probable perjury at the trial" (Pet. 23). While Sloan did notify the prosecutors that Magruder had asked him to underestimate the sums given to Liddy,[13] Magruder's trial testimony on this matter was accurate and consistent with Sloan's (Tr. 1435-36). There is, we submit, no credible evidence that the prosecutors knew, or had reason to know, that it was sponsoring perjured testimony by Magruder. This argument, as well as the implicit claim that the prosecution knowingly sought to conceal the involvement of others, is refuted by petitioner's own statement that the prosecutors wanted him to turn state's evidence (A.119).

The court below found "no support" for petitioner's "implied allegation" that he had been prejudiced by the supposed misconduct (Pet. App. 23a). Although Magruder in fact gave false testimony at the trial, the testimony concealing the involvement of others did not indicate in any way that petitioner was guilty of burglary, electronic surveillance, or the related offenses charged in the indictment. As we discussed above, truthful disclosure of the involve-

[13] Any discrepancy between Magruder's grand jury testimony and Sloan's was known to the defense before Magruder's trial testimony, since the prosecutor provided petitioners with copies of the grand jury testimony.

ment of higher-ups would not have tended to absolve petitioner of his guilt.[14]

3. The court below properly concluded that petitioner was not denied the effective assistance of counsel. The argument that counsel did not "vigorously assert all ethical defenses" (Pet. 28) ignores petitioner's unequivocal Senate testimony (Senate 242-43). As the quotation at pp. 9-10, *supra*, indicates, petitioner, after conversations with his attorney, made his own decision when to reveal the basic information upon which he now says he would bottom his defense.[15]

The present assertion that Alch attempted to coerce petitioner into pleading guilty and not testify at the trial (Pet. 30) is refuted by petitioner's Senate testimony that Alch never urged him to plead guilty or keep silent (Senate 150, 247). The dispute

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[14] Other alleged misconduct referred to in the petition—failure to recall petitioner before the grand jury after the trial and failure to track down certain materials of Hunt (Pet. 27-28)—obviously have no relevance to the determination of petitioner's guilt at his trial.

[15] Alch testified before the Senate Committee that he told petitioner that the crucial decision whether to testify could only be made by petitioner and that petitioner ultimately decided, without any reservations, not to testify (Senate 304). It was at that point, according to Alch, that petitioner disclosed that Mitchell had approved the operation.

Alch also denied that he spoke to petitioner about executive clemency and that he told petitioner that he would be hearing from the White House (Senate 302-303). Alch further stated that petitioner never had informed him that petitioner believed the Watergate operation was legal (Senate 296).

about making a CIA defense was resolved before the trial commenced in a conference with the court in which Alch agreed not to press such a defense and petitioner decided he would continue with Alch as one of his attorneys (Jan. 3, 1973, Tr. 3-4). Finally, as the court below found, the allegations that Alch funnelled information about petitioner's trial plans to the White House (Pet. 34-38) do not establish a conflict of interest or disloyalty, but under the circumstances here merely indicate that the attorney "was consulting with the persons who arguably authorized the crime for which McCord was being tried and was allegedly involved in the same conspiracy that McCord himself was involved in. . . . McCord's allegations thus reduce themselves to the claim that his attorney violated his confidences; however, in the facts of this case, this is not evidence of disloyalty. Even standing alone, such a violation would not be a deprivation of Sixth Amendment rights since McCord himself knew of these violations at the time. . . ." (footnotes omitted, Pet. App. 31a-32a).[16]

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[16] The fact that Alch agreed to produce electronic equipment to the prosecutor (the monitoring equipment, Pet, 32-33) did not enhance the chances of conviction since there was incontrovertible evidence that petitioner participated in the illegal break-in and electronic surveillance in the offices of the Democratic National Committee and was arrested with bugging equipment in his possession. Nor was there a breach of the agreement against using this equipment as evidence at trial. The letter, upon which petitioner relies, shows that

Thus, contrary to petitioner's assertion the decision below does not conflict with decisions of this Court or other courts of appeal on the assistance of counsel issue.[17] The court accepted petitioner's premise "that disloyalty or conflict of interest may, if substantial and proven, result in the denial of effective assistance of counsel in controvention of the Sixth Amendment" (Pet. App. 29a). See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60 (1942). That the court's appraisal of the facts resulted in rejection of the claim in the circumstances of this case does not warrant review by this Court.[18]

4. Petitioner, although he did not press the claim before the court of appeals, asserts that he was entrapped. It is obvious from the circumstances of this case that the relationship of petitioner and the other persons who were or had been government officials

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only "the fact of delivery" from petitioner, not the equipment itself, would not be used against petitioner (Pet, App. 37a).

[17] The court below followed the standard set forth in *United States* v. *DeCoster*, 487 F.2d 1197, 1202 (1973), for adjudicating claims of ineffective assistance of counsel: "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."

[18] Petitioner in his post trial motion also complained that his attorney failed to cross-examine properly Magruder, Sloan and Porter (A. 121). He now asserts, for the first time, that he in fact urged his attorney to cross-examine Magruder on two specific points about the involvement of others in the Watergate operation (Pet. 29). This assertion, however, implicity conflicts with his post-trial letter and his sworn testimony that he waited for an appropriate time to open up the involvement of others. In addition, as we argue above, disclosure of the involvement could not have aided his defense.

does not contain the elements of entrapment as that defense has been developed in the federal courts. See *United States* v. *Russell*, 411 U.S. 423 (1973), in which this Court declined to enlarge the defense to cover defendants who willingly participated in ventures in which it might be said that the involvement of government undercover agents was "excessive." As the court below concluded, albeit in the context of another issue, "[t]he operative fact is that this conspiracy, of which McCord was a part for at least part of the time, was not designed so much to convict private criminals as to prevent additional convictions. This then is not a case of the end of law enforcement justifying the means, but of the end itself being, not law enforcement, but criminal activity." (Pet. App. 26a-27a.)

5. On the basis of a claim that the instant case is "the only case known to petitioner where an individual has been convicted for electronic eavesdropping pursuant to authorization by the highest law enforcement officials of this nation," petitioner argues that he has a defense based upon impermissible prosecutorial selectivity (Pet. 24-26). This defense, however, was not raised by pre-trial motion and is untimely under Rule 12(b) (2), F.R.Cr.P. See *Davis* v. *United States*, 411 U.S. 233 (1973); *United States* v. *Berrigan*, 482 F.2d 171, 174-175 (3d Cir. 1973). Nor do petitioner's complaints about his attorney warrant relief from this waiver. As we have pointed out, *supra*, petitioner's own testimony shows that he, rather than his attorney, made the

decision to keep silent about the involvement of Mitchell and Dean.

Moreover, on the merits, petitioner has no valid defense on this ground. His claim of authorization primarily rests upon an approval of electronic surveillance plans against a political party by an official about to become chairman of a rival political organization and carried out when this person is merely a former government official. A prosecution based upon such "unique" and "bizarre" facts cannot be fairly termed impermissibly selective. See *United States* v. *Berrigan, supra,* 482 F.2d at 179. Beyond that, petitioner does not suggest that his prosecution was based upon an unjustifiable standard such as race, religion or other arbitrary classification. See *Oyler* v. *Boyles,* 368 U.S. 488, 456 (1962). He also does not contend that he was singled out for prosecution because of his exercise of certain constitutionally protected rights. See *United States* v. *Berrios,* 501 F.2d 1207 (2d Cir. 1974). Indeed, if the United States Attorney had not sought an indictment in this case, he would have been condemned as aiding in an effort to prevent the discovery of the Watergate conspiracy and would have been charged with dereliction of his duty.

Finally, petitioner's argument that the pardoning of Richard Nixon furnishes a basis for relief from his judgment of conviction rests upon a misunderstanding of the nature of the power to pardon granted by Article II, section 2, clause 1 of the Constitution. The "very essence of the pardoning power

is to treat each case individually. * * * Individual acts of clemency inherently call for discriminating choices because no two cases are the same." *Schick* v. *Reed*, No. 73-5677, decided December 23, 1974. Moreover, even if this claim presented a substantial issue, it is not ripe for resolution. It was not presented below, and as the court concluded, "any legal questions that may arise from the pardon are not sufficiently focused by the adversary process to justify appellate consideration of their validity or substantially at this time" (Pet. App. 27a, n.59).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

HENRY S. RUTH, JR.,
Special Prosecutor,

SIDNEY M. GLAZER,
Attorney.

March 1975

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